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An act of the last legislature of the State of South Dakota, passed with the object of compelling all private bankers to adopt the corporate form, and to conduct the banking business under certain regulations, has recently been considered by the Supreme Court of that State in the case of State v. Scougal, which was an information against the defendant for carrying on a banking business without having complied with the law. The information was quashed by the lower court, and this decision was affirmed by the supreme court. In a lengthy opinion the court discusses the question whether the legislature has power to prohibit individual citizens from exercising the incidental powers of banking. The argument proceeds by demonstrating that the term "franchise" or "banking powers" does not include the incidental powers of banking, but has reference to those higher powers exercised by governments in issuing notes as circulating money, which power or franchise is found in the federal or State constitutions. The State is not supposed, they say, to interfere with the right of purchasing and selling bills of exchange, coin or bullion, or of discounting and negotiating promissory notes, drafts and other commercial commodities. These privileges always belonged to the citizens of the country generally. If the legislature, they contend, can create a "franchise" of this kind, why not of merchandising, blacksmithing or farming? These are natural and common rights of the citizens which he always possessed and of which he cannot be deprived by the application of the theory of police power. The State admits that banking is of itself not injurious to the community and hence the State cannot say to natural persons that they may be prohibited from doing that which the act in terms confers upon artificial persons. Such a broad assertion of the police power is hampered by the State and national constitutions which have placed certain safe-guards around the citizen and which protect him from invasion by unauthorized legislative action. The court also alludes to other constitutional principles which were successfully asserted in Jacob's Case, 98 N. Y. 98, involving the right to manufacture cigars in tenement houses; in the Marx Case 99 N. Y. 377, the oleomargarine case; the Butcher's Union slaughter house case, 111 U. S. 746, and the slaughter house cases, 16 Wall. 116.

The court considers that the business of banking is affected with a public use but it does not follow that like any other harmless business the citizens may be deprived of the right to carry it on. Like any other business however it may be subjected to reasonable regulations alike applicable to all citizens and corporations.

The court refused to follow the ruling of its sister Supreme Court of North Dakota in reference to the North Dakota banking law of similar character, in State v. Woodmansie. The latter court ruled that the matter of regulating and prohibiting private banking, and all banking not expressly authorized by law, is strictly within the police power of the State. Between the two conflicting decisions the student may easily take his choice. It occurs to us, however, that if the statute in controversy may be considered absolutely prohibitory in character, the South Dakota court is right. In our judgment, a State has not the power to prohibit any and all banking, and the court of North Dakota, in so declaring, is undoubtedly wrong. But it is possible to look upon the legislation in question as simply regulatory, and reasonably so, and in that view the South Dakota court was wrong and the North Dakota court was right. It is undoubtedly within the police power of a State to make reasonable regulations of and restraints upon banking, and certainly there is no subject of legislation more in need of safeguards, in the interests of the people, and, as the North Dakota court says, "it would avail little to provide salutary rules and wholesome safeguards for the business of banking where carried on by a corporation, if at the same time private persons, firms and corporations are permitted to carry on the business unhampered by such restrictions and safeguards."

Upon the whole we are inclined to think the North Dakota decision is the better law.

In Nebraska, as in some others of the States, the judges of the supreme court prepare their own head-notes to cases. The recent case of Holliday v. Brown, from that State, contains the following official syllabus: "There is an unwritten rule in this court that the members thereof are bound only by the points stated in the syllabus of each case. Each judge, in the body of an opinion, necessarily must be permitted to state his reasons in his own way, without binding the members of the court to assent to all such reasoning, although they may concur in the conclusions reached." The *New York Law Journal* suggests that this is in effect saying to the public: "Read our opinions if you are interested in what we have to say, but read our head-notes to discover what we really mean," a most effectual antidote for the uncertainties produced by *obiter dicta*." We must say that we regard the practice of preparing the head-notes by the judges who write the opinions as very satisfactory, and when it is done by them the "unwritten rule" adopted by the Supreme Court of Nebraska is a good one, as enabling the practitioner readily and correctly to grasp the real points of a case, and sift out that which is mere surplusage.

NOTES OF RECENT DECISIONS.

NEGLIGENCE — PERSONAL INJURIES —DEFECTIVE MACHINERY — EVIDENCE OF AFTER PRECAUTIONS.—Upon the question presented in Glasspell v. Northern Pacific Railroad Co., decided by the Supreme Court of the United States, there has been some difference of opinion in the courts of the several States, but it may be said that the question is now settled by decisions of most of the States in accordance with this latest decision of the highest court mentioned. In the case referred to it was held that a servant suing for personal injuries caused by a defective machine cannot show that his employer made changes in the machine after the accident, since precautions for the future cannot be considered as showing actionable negligence in the past. The same has been laid down in Minnesota, Morse v. Railroad Co., 30 Minn. 465; in New York, Corcoran v. Peekskill, 108 N. Y. 151; in Connecticut, Nalley v. Carpet Co., 51 Conn. 524; in Missouri, Ely v. Railroad Co., 77 Mo. 34; in Texas, Railroad Co. v. Hennessey, 75 Tex. 155; in Indiana, Railroad Co. v. Clemm, 123 Ind. 15; in Illinois, Hodges v. Percival, 132 Ill. 53; in Michigan, Lombar v. Village, 86 Mich. 14; in Massachusetts, Shinners v. Proprietors, 154 Mass. 168. The only States in which subsequent changes are held to be evidence of prior negligence are Pennsylvania and Kansas, the decisions in which are supported by no satisfactory reasons. McKee v. Bidwell, 74 Pa. St. 218; Railway Co. v. Weaver, 35 Kan. 412.

The supreme court adopted the language of the ~~Michigan~~ Minn. court in Morse v. Railroad Co., above cited, as follows: "But on mature reflection we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is upon principle wrong, not for the reasons given by some courts, that the acts of the employees in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for considering such an act as an admission of previous neglect of duty. A person may have exercised that which the law required, and yet in the light of his new experience, after an unexpeeted accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards." The same rule appears to be well settled in England. In a case in which it was affirmed by the Court of Exchequer, Baron Bramwell said: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent a recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that because the world gets wiser as it gets older, therefore it was foolish before." Hart v. Railroad Co., 21 L. T. (N. S.) 261.

MARRIAGE PROMISE—BREACH—JUSTIFICATION.—It would be difficult to find a case of greater novelty than Shackleford v. Hamilton, 19 S. W. Rep. 5, decided by the Supreme Court of Kentucky. It was there held that where a man contracts syphilis, but afterwards, being by skilled physicians pronounced cured, and fit to marry, makes a

promise of marriage in good faith, the subsequent reappearance of the symptoms of the disease, without fault on his part, in such form that his physicians advise him that he ought not to marry, justify him in refusing to fulfill the contract. The court below, looking upon the contract of marriage in the light of any ordinary contract, and entertaining the opinion that as the defendant had entered into this marriage contract, he was bound in damages for its breach, although it might have been his duty, under the circumstances, not to execute it, sustained the cause of action. The court above, however, concluded otherwise, saying that "if such a contract as that of marriage is to be treated in the light of a mere bargain and exchange of chattels between parties competent to contract, then it seems to us there would be but little difficulty in sustaining the action of the court below; but if the agreement, when entered into, is to be treated as creating a *status* that forms the basis of our entire social system, and in which society has more interest in preserving its purity than the parties to the agreement, it must follow that the defense interposed to the appellee's claim for damages was in law as well as morals sufficient to prevent the recovery." The court concludes as follows:

While the contract to marry is silent as to any condition, it must be implied that any subsequent change in the physical or mental condition of either party without fault, so as to render it impossible, in the nature of things, to accomplish the objects for which the marriage relation is brought about, will release the parties from the agreement. Impotency, insanity, or such a diseased condition of the body as would affect the offspring, and endanger the life of the mother, if the contract was carried out, would certainly be within this rule. Any other doctrine would require the same construction to be given the agreement to marry that is given to contracts for the sale and delivery of personal property; where the party can recover it must be in damages for the breach, although impossible to perform it; in other words, it is urged that the woman must have either the husband or damages in his stead, if he is able to have the marriage ceremony performed. This is also the objection to the majority opinions rendered in the court of queen's bench, in the case of Hall v. Wright, reported in 96 E. C. L. 745. We concur with the minority opinions in that case that the contract of marriage is subject to implied conditions peculiar to itself. In that case the defense was that, after the promise, and before the breach, the defendant was afflicted with bleeding from the lungs, and by reason of the disease became incapable of marriage without great danger to his life, and therefore unfit for the married state, of which the plaintiff had notice. After reviewing the authorities upon the question, Erle, J., said: "The principle deduced from the cases seems to be that a contract to marry is assumed in law to be made for the purpose of mutual comfort, and is avoided if by the act of God or the opposite party the circumstances are so changed as to make intense misery, instead of mutual comfort, the probable result of performing the contract." The majority opinion was rendered on the idea that the disease was not such a state of health as made it improper for the defendant to marry, and therefore not impossible of performance; and, if a case like the one being considered had been presented, we doubt if any difference of opinion would have been expressed. Pollack and other text-writers on contracts, in alluding to this opinion, say that it is so much against the tendency of the latter cases that it is now of little or no authority beyond the point decided; but, if that opinion had been unanimous, although entitled to great weight, we would not be inclined to follow its reasoning, or concur in the conclusion reached.

The only American case we have found on the question is reported in 86 N. C. 91 (Allen v. Baker), the opinion delivered by Ruffin, J. In that case the defendant refused to comply with his contract, because he was afflicted with a disease similar to the one this defendant had. The disease was contracted before the contract was entered into, but the defendant had been advised, and in fact believed, that he could be cured in time to enable him to fulfill his engagement. Acting in good faith, and from a conscientious conviction that his disease was incurable, he refused to comply with his agreement, and the court in that case said: "We cannot understand how one can be liable for not fulfilling a contract when the very performance of it would in itself amount to a great crime, not only against the individual, but against society itself." The present case is much stronger for the defense than the case cited. In the one the defendant knew the disease was upon him when he made the contract, but was advised that he would be well in time to consummate it; while in this case the defendant believed he was well at the date of the contract, and had been so advised by his physicians long before the contract was entered into.

CRIMINAL LAW — EMBEZZLEMENT — CASH REGISTER DRAWER—LARCENY.—In Commonwealth v. Ryan, the Supreme Judicial Court of Massachusetts declare that a clerk who withdraws, from the money drawer of a cash register, money that he had deposited a moment before without registering the sale of the article for which it had been received, is guilty of embezzlement. Holmes, J., says:

We must take it as settled that it is not larceny for a servant to convert property delivered to him by a third person for his master, provided he does so before the goods have reached their destination, or something more has happened to reduce him to a mere custodian (Com. v. King, 9 Cush. 284), while on the other hand, if the property is delivered to the servant by his master, the conversion is larceny. Com. v. Berry, 99 Mass. 428; Com. v. Davis, 104 *Id.* 548.

This distinction is not very satisfactory, but it is due to historical accidents in the development of the criminal law, coupled perhaps with an unwillingness on the part of the judges to enlarge the limits of a capital offense. Bazeley's Case, 2 Leach, 843, 848, note; *Id.* 35, note; 2 East P. C. 568, 571. There was no felony

when a man receives possession of goods from the owner without violence. Glanv. Elec. Cas. 13; Y. B. 13 Edw. IV, 9, pl. 5; 3 Co. Inst. 107. The early judges did not always distinguish clearly in their language between the delivery of possession to a bailee and the giving of custody to a servant, which indeed later judges sometimes have failed to do. Littleton in Y. B. 2 Edw. IV, 15, pl. 7; 13 Edw. IV, 10, pl. 5; 3 Hen. VII, 12, pl. 9; Ward v. Macauley, 4 T. R. 489, 490. When the peculiar law of master and servant was applied either to the master's responsibility or to his possession, the test seems to have been empirical rather than based on the notion of *status* and identity of person. See Byington v. Simpson, 134 Mass. 169, 170. Within his house a master might be answerable for the torts of his servant, and might have possession through his servant's hands. Outside there was more doubt, as when a master intrusted his horse to his servant to go to market. Y. B. 21 Hen. VII, 14 pl. 21; T. 24 Edw. III; Bristol, in Molloy, De Jure Mar. bk. 11, chap. 3, § 16; Y. B. 2 Hen. IV, 18, pl. 6; Staundforde, I, chap. 15, fol. 25; chap. 18, fol. 26; 1 Hale P. C. 505, note. See Watson v. State, 13 Reporter, 678, 679; and further, 42 Ass. pl. 17, fol. 260; 43 Edw. III, 11, pl. 13; Ass. Jerus. (ed. 1690), chaps. 205, 217. The law was settled in the case of goods delivered to a servant by his master by Statute of 21, Henry VIII, chapter 7, in a way which has been thought to be only declaratory of the common law in later times, since the distinction between the possession of a bailee and the custody of a servant has been developed more fully. 2 East P. C. 564, 565; Wilkin's Case, 1 Leach, 520, 523. See Kel. J. 35; Fitzh. Nat. Brev. 91*e*, Blosse's Case, Moore, 248; Owen, 52; Gouldsp. 72. But probably when the act was passed it confirmed the above mentioned doubt as the master's possession where the servant was interested with property at a distance from his master's house in cases outside the statute. In Dyer, 5*a*. 5*b*, it was said that it was not within the statute if an apprentice ran off with the money received for his master's goods at a fair, because he had it not by the delivery of his master. This very likely was correct, but the case was taken before long as authority for the broader proposition that the act is not a felony, and the reason was invented to account for it that the servant has possession, because the money is delivered to him. 1 Hale P. C. 667, 668. This, it will be seen, was a perverted rendering of the old and soon exploded notion that a servant away from his master's house always has possession. The old case of the servant converting a horse with which his master had intrusted him to go to market was stated and explained in the same way. Crompton Just 35*b*, pl. 7. See Bass' Case, 1 Leach, 251. Yet the emptiness of the explanation was shown by the fact that it still was held felony when the master delivered property for service in his own house. Kel. J. 35. The last step was for the principle thus qualified and explained to be applied to a delivery by a third person to a servant in his master's shop, although it is possible at least that the case would have been decided differently in the time of the year books (Y. B. 2 Edw. IV. 15 pl. 7; Fitzh. Nat. Brev. 91*e*) and although it is questionable whether on sound theory the possession is not as much in the master as if he had delivered the property himself. Rex v. Dingley, 1687, stated in Bazeley's Case, 2 Leach, 835, 840, and in King v. Meares, 1 Show. 50, 53; Waite's Case, 1743, 2 East P. C. 570; 1 Leach, 28, 35, note; Bull's Case, stated in Bazely's Case, 2 Leach, 841; 2 East P. C. 571, 572; Bazely's Case, *ubi supra;* Reg. v. Masters, 1 Den. Cr. Cas. 332; Reed's Case, Dears. Cr. Cas. 257, 261, 262.

The last-mentioned decisions made it necessary to consider with care what more was necessary, and what was sufficient to reduce the servant to the position of a mere custodian. An obvious case was when the property was finally deposited in the place of deposit provided by the master, and subject to his control, although there was some nice discussion as to what constituted such a place. Reg. v. Reed, Dears. Cr. Cas. 257. No doubt a final deposit of money in the till of a shop would have the effect. Waite's Case, 2 East P. C. 570, 571; 1 Leach, 28, 35, note Bull's Case. 2 East P. C. 572; 2 Leach, 841, 842; Bazely's Case, 2 East P. C. 571, 574; 2 Leach, 835, 843, note; Reg. v. Wright, Dears. & B. Cr. Cas. 431, 441. But it is plain that the mere physical presence of the money there for a moment is not conclusive while the servant is on the spot, and has not lost his power over it, as for instance, if the servant drops it, and instantly picks it up again. Such cases are among the few in which the actual intent of the party is legally important, for apart from other considerations, the character in which he exercises his control depends entirely upon himself. Sloan v. Merrill, 135 Mass. 17, 19; Com. v. Drew, 153 *Id.* 588, 594.

It follows from what we have said that the defendant's first position cannot be maintained, and that the judge was right in charging the jury that if the defendant, before he placed the money in the drawer, intended to appropriate it, and with that intent simply put it in the drawer for his own convenience in keeping it for himself, that would not make his appropriation of it just afterwards larceny. The distinction may be arbitrary, but as it does not affect the defendant otherwise than by giving him an opportunity, whichever offense he was convicted of, to contend that he should have been convicted of the other, we have the less uneasiness in applying it.

ADMISSIBILITY OF THE BOOKS OF A CORPORATION AS EVIDENCE.

During recent years a series of decisions has worked no little confusion in the law pertaining to this subject by promulgating a doctrine charged to be in conflict with earlier decisions, and one of the most ancient and fundamental principles of the common law. The decisions in question hold, in effect, that the stock books, or indeed all records of a corporation, whether of public or private transactions, are admissible in evidence to prove that the persons whose names are entered therein are stockholders, and that the transactions therein, of whatever nature, have taken place, and are binding upon the alleged stockholder, the entry of his name on the stock books being *prima facie* evidence of his membership.[1] The doctrine of decisions referred to began with Hoagland v. Bell,[2] but acquired its dignity and importance from its adoption by the Supreme Court of the United States in the case of Turnbull v. Payson,[3] in which the court stated the doctrine broadly and cited numerous authorities supposed to sustain it.

1 Glenn v. Orr, 96 N. C. 413.
2 36 Barb. 57.
3 Turnbull v. Payson, 95 U. S. 418.

The question received little further attention until the famous Glenn, Trustee, cases brought it again into notice, and gave it so wide a recognition and elaboration that it bids fair to become a well-settled doctrine of law despite its inherent fallacy and injustice. To disclose the error latent in the doctrine, and to point out when and how the misconception arose, it will be necessary for us to make an exhaustive examination of all the earlier authorities, both English and American, to determine the scope and limitations of the admissibility of corporate records.

To narrow the question to the precise doctrine in controversy, it is well to state what rules admitting corporate records are not disputed to any marked extent:

1. In a suit against a corporation, or one claiming through a corporation, its books are admissible against it or its privies at the instance of the adverse party, on the ground that they are declarations against its interest;[4] and if so introduced, they may be doubtless used for both parties. This rule is precisely the same as in a suit against an individual.

2. The books of a corporation, it seems, may be introduced either for or against it to prove its corporate acts and proceedings, whether in a suit between members or between it and a stranger, or between it and a person sought to be charged as a member,[5] or between it and a member holding adversely to it. An examination of the authorities admitting such records as against a stranger, or a member holding adversely to the corporation, show them to be very largely cases of municipal corporations where the records were public and free to the inspection of the public.[6] In such cases the rule is eminently just and reasonable. We admit that some of the authorities go further, but we can see no principle that justifies extending the rule to cases between a private corporation for gain and a stranger who has no access to records of even its most public acts. But corporate acts within the meaning of this rule are limited to such acts only as are done in public meetings of either the stockholders or the board of directors, trustees or municipal legislatures intending to apply to and affect all alike, and not to private contracts and dealings with strangers or with members, *e. g*, organization,[7] acceptance of charter,[8] levy of assessments,[9] election of officers[10] or members, acts and votes of the corporation required to be recorded by the charter, statute or some by-law,[11] and to prove that meetings took place at time recited therein. Nor does the insertion of the private business transactions of the corporation in such public records render such entries admissible; it is the nature of the entry which determines its admissibility.[12] It may be added that most of the text-books lay down the rule that even the records of corporate acts are not admissible in suits between them and a stranger in their favor,[13] but the rule can hardly be said to be accurate in the face of the authorities.[13]

3. It is not our purpose to inquire whether the private transactions and dealings of the company are admissible in a suit between two members, as this has no bearing on the controversy.

4. Statutes have been passed in a few of the United States and in England making stock books *prima facie* evidence that those whose names are entered therein are stockholders, and the decisions rendered under the dictation of these statutes cannot support the common law doctrine.[15]

This narrows the issue down until it may be confined to the negative or affirmative of the following questions: Are the stock books *prima facie* evidence that those whose names are entered therein are stockholders? This at once raises two subordinate questions: 1. Does the alleged stockholder stand in the position of a member before his membership is proved, or in the position of a stranger? 2. Are the stock books in the nature of public records, or of private account books, contracts or private dealings with the company? Where the issue is whether or not a man is a stockholder of the company, or where he holds adversely to the company, that he stands in the position of a stranger to it, has been decided in several cases.[16] There has never been a denial in terms of this proposition in any case. The stock books are in the nature of private account books.[17] The reasons for rejecting the stock books and other private account books or records of the company's private dealing in a suit to charge an alleged stockholder who denies his connection with or membership in the company are as follows: 1. A corporation is as to its private rights in the same situation as an individual; its record of such matters is no more than an entry by a

4 Warriner v. Giles, 2 Stra. 954; Moore's Case, 17 How. St. Tr. 854; Gibbon's Case, 17 How. St. Tr. 810.

5 Haynes v. Brown, 36 N. H. 545, 568, and cases cited.

6 Owings v. Speed, 18 U. S. 422; Warriner v. Giles, *supra;* Rex v. Mothersell, 1 Stra. 93; Gibbon's Case, *supra.*

7 1 D. & B. 306; 10 Ala. 82; 5 Ga. 239; 4 Denio, 392.

8 Coffin v. Collins, 17 Me. 440.

9 Wh. M. Ry. Co. v. Eastman, 34 N. H. 136; Plank Road v. Rice, 7 Barb. 157-62; Gibbon's Case, 814.

10 Gibbon's Case, *supra;* Commonwealth v. Woelper, 3 S. & R. 29.

11 Owings v. Speed, *supra;* Whitman v. The Church, 24 Me. 236; Haynes v. Brown, 36 N. H. 545, 568.

12 Mayor of London v. Mayor of Lynn, 1 Hy. Blackstone, 210-14; Marriage v. Lawrence, 3 Barn. & Ald. 142.

13 Thompson, Liability of Stockholders, § 370; Wharton on Evidence, § 662; Taylor on Evidence, § 1781; Lindley on Partnership, 550.

14 Owings v. Speed, *supra.*

15 Bain v. Whetmore, 3 H. L Cas. 22; Birkenhead v. Brownrigg, 4 Ex. 425: Railway Co. v. Applegate, 21 W. Va. 172; Mudgett v. Horrell, 33 Cal. 25 (can hardly be said to accede to the doctrine even with statute); Taylor v. Hughes, 2 Jon. & Lat. 24.

16 Haynes v. Brown, 36 N. H. 567; Hill v. Manch. & S. Water Co., 2 N. & M. 573; Birkenhead v. Brownrigg, 4 Ex. 425.

17 Haynes v. Brown, 36 N. H. 568.

party in his own memorandum book making evidence for himself.[18] 2. It is adverse to the common law, to reason, common sense and justice, and an exception to all ordinary rules of evidence.[19] 3. It may fix upon a man a liability to which he in no way assented and without the slightest action or fault on his part. The law affords to fraud-feasors an easy and effectual way of saddling on a man a liability without his knowledge, intervention or assent, forcing him to prove the negative of a fact of which he has no information, and when death has closed his lips deprives him absolutely of defense. The law through its rule of evidence makes his contract for him and relieves the fraud-feasor of showing a meeting of minds, if he will simply produce a book in which he (said fraud-feasor) has written, without oath, a memorandum of the alleged contract. This is a species of absurdity[20] violating the rule that such books cannot be received to charge a stranger,[21] or one who stands in the position of a stranger,[22] and the rule that prohibits the courts from making contracts for men.[23] 4. That it ignores the distinction between the records of a corporation of its corporate acts and proceedings, and of its private books of account and records of its private rights, contracts and dealings,[24] and strives to draw a distinction that does not exist[25] between the books of a corporation containing its private contracts and accounts, such as the stock book,[26] transfer book,[27] stock ledger,[28] etc., and the private account books of an individual.

On the other hand, the reasons for admitting these books, so far as any reason has ever been assigned, are as follows: 1. (Quotation from Glenn v. Orr, *supra*): "Corporations in this country are the creatures of statute with prescribed rights and powers, subject to an important extent to public control and supervision, and are therefore presumed to exercise their powers as allowed and required by law, and to keep their records properly and truly." In the above case the court admitted: (1.) The records of proceedings and organization; (2.) List of names and shares of stockholders; (3.) Record of the sums of money paid by each for his stock; (4.) Entries to show amount yet due therefor; (5.) An Account of its business transactions. All this before the man was proved to be a shareholder.) 2. Because the parties so charged are competent to testify in their own behalf, and may interpose their testimony to overthrow the presumption.[29] 3. To avoid the great inconvenience creditors would be put to, if they were required to make proof of subscriptions made perhaps years ago. (Glenn v. Orr, *supra*.)

In entering on the discussion of this question I can find no better plan than to analyze some of the principal cases, and let the courts speak for themselves, commenting only where necessary. The leading case holding the affirmative is Turnbull v. Payson.[30] In this case there was ample evidence outside of the books to establish that defendant was a stockholder, he having received and signed a receipt for a dividend (a fact on which the court lays great stress in the opinion), so that the court would have been justified in finding from the outside evidence that he was a member, and therefore, the books were admissible against him, but instead the learned judge went aside to follow the lead of an ill-considered New York case and laid down the rule as follows:

"Where the name of an individual appears on the stock book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock; in a case where there is nothing to rebut that presumption. And in action against him as a stockholder, the burden of proving that he is not a stockholder, or rebutting that presumption is cast upon the defendant." The court then cites a number of authorities but one of which, Hoagland v. Bell, sustains its position, and that case cites not a single authority to sustain it, and was decided by the notorious Barnard.

Of the cases cited by Clifford, J., in Turnbull v. Payson, one uses this language: "Before the books or either of them could be held presumptive evidence of the facts or fact therein contained as against the defendant, it was necessary that it should appear that he was a stockholder; but this was the fact in issue, and to be established before either book produced could become presumptive evidence of any fact against him. There is a species of absurdity in holding that the books were admissible evidence to prove the very fact on

[18] Marriage v. Lawrence, *supra;* Brett v. Beales, 1 M. & M. 416; Chase v. Syc. Ry. Co., 38 Ill. 215; Mayor of London v. Mayor of Lynn, *supra;* Taylor on Evidence, § 1721; Bain v. Whetmore, *supra;* Birkenhead v. Brownrigg, *supra.*

[19] Bain v. Whetmore, *supra;* Howard v. Glenn, 11 S. E. Rep. 610; Taylor on Evidence, § 1721.

[20] Mudgett v. Horrell, 33 Cal. 25.

[21] Haynes v. Brown, 36 N. H. 568; Mayor of London v. Mayor of Lynn, *supra;* South Hampton v. Fowler, 52 N. H. 225; Wharton on Evidence, § 662; Greenleaf on Evidence, § 493; 1 Saund. Pl. & Ev. p. 850; Brett v. Beales, *supra;* Jones, Adm'r, v. Trustees, 46 Ala. 626; Marriage v. Lawrence, *supra;* Jackson v. Donnelly, 3 Johns. R. 225.

[22] Haynes v. Brown, *supra;* Mudgett v. Horrell, *supra;* Birkenhead v. Brownrigg, *supra;* Chase v. Sycamore Ry. Co., *supra;* Railway Co. v. Hickman 28 Pa. St. 318; White Mt. Ry. Co. v. Eastman, 34 N. H. 136; Bain v. Whetmore, *supra;* Hill v. Manch. Water Works, *supra.*

[23] Thompson on Liability of Stockholders, § 370.

[24] Glenn v. Orr, 96 N. C. 413.

[25] South Hampton v. Fowler, *supra;* Brett v. Beales, *supra;* Mayor of London v. Mayor of Lynn, 1 Hy. Blackstone, 214; Jackson v. Donnelly, *supra;* Haynes v. Brown, *supra;* White Mt. Ry. v. Eastman, *supra;* Hager v. Cleveland, 36 Md. 476 494; Jones, Adm'r, v. Trustees, *supra.*

[26] Haynes v. Brown, *supra;* Chase v. Sycamore Ry., 38 Ill. 265; Mudgett v. Horrell, *supra.*

[27] Mudgett v. Horrell, *supra.*

[28] P. & W. Chester Ry. v. Hickman, 28 Pa. St. 318; Neilson v. Crawford, 52 Cal. 248; Mfg. Co. v. Vandyke, 1 Stock. 498.

[29] Glenn v. Orr, *supra;* Railway Co. v. Applegate, 21 W. Va. 172; Hoagland v. Bell, *supra;* Mudgett v. Horrell, *supra.*

[30] 95 U. S. 418, per Clifford, J.

which their admissibility depended."[31] 2. One case does not raise the point, defendant not denying the subscription, but questioning whether the corporation had ever come into existence.[32] 3. In one it was shown (not by the books) that the defendant signed the original subscription, and hence the books were evidence to prove resolution calling for assessments on stock (*i. e.*, corporate act).[33] Two cases simply decide that the books were admissible to prove corporate acts when properly authenticated.[34] The case is thus seen to rest upon no authority.

The courts in the later decisions have been more industrious in seeking for authority, and sorely exercised to rest the doctrine on valid reason, but their efforts have been crowned with but indifferent success. The reasons assigned in Glenn v. Orr,[35] *supra*, that corporations are largely under the control and supervision of the government and their rights and powers are prescribed by statute, is without weight, in view of the fact that such regulation and prescription does not extend to fixing the mode in which the company shall keep its private books or requiring it to keep its stock book and transfers registered so that strangers may inspect them to ascertain whether their names have been fraudulently entered thereon. Nor do they even require that these private account books shall come under the supervision of the corporate body as a whole, to be subjected to correction and approval. It is clear that the court has formed a misconception of the law, such misconception arising beyond question from a misunderstanding of the principles upon which the old English cases admit the public records of the town to prove their public acts. The case of Owings v. Speed, at first view seems to be a case where records of a mere private right were admitted on behalf of the corporation's vendee, but an examination shows that the entries thus admitted were of transactions by the trustees of the company which were the very things expressed by the statute creating it, to be its purpose and object; hence, when construed with the statute, show them to have been the public acts of a company in the nature of a municipal corporation, and that such record was open to pulic inspection.

The exact point of misconception in the case of Hoagland v. Bell, and the cases which follow it, seems to be a misunderstanding of the nature of corporate records admitted under the rule, and of the real position a man who denies membership in it with regard to the corporation. In the first place, it hardly needs argument that stock books do not record corporate acts. The corporate acts or proceedings of a corporation may be defined to be such as are transacted at a public meeting of either the stockholders or of the board of directors, and intended to affect all the members alike. The record of these is made during the proceedings, and subjected at a subsequent meeting of the same body to public reading, correction and approval. Records of this sort may be said to be the tongue of the corporation, being the action of the whole body having jurisdiction by notice or by law of the subject-matter, and in the correctness of which all the parties interested are agreed.[36] Not so with the stock books; they are kept by the book-keeper, who is subject to the control of no individual member,[37] entering a record of the private contract of the member with the legal personage of the corporation, and the corporation's account of the extent to which this member has fulfilled his contract with itself.

In law the corporation is a legal person, may and does hold interests adverse to its members; may sue and be sued by members on account of breaches of contracts made between them. In all such cases the member stands in the position of a stranger to it.[38] A contract of subscription to stock is such a contract in which the member holds adversely to it. If the stock were not issued the member could sue for breach; if the calls were not paid the corporation could sue for breach. If the corporation sues, the individual may deny having contracted. The corporation's record showing that he had contracted would not affect him in the same manner with all other members of the corporation. How, then, could it be a corporate act?

The plea of convenience made in Glenn v. Orr, is not a legal reason; the law does not justify a man in sitting down and writing up his own story of a controversy and then offering said writing in evidence, because it would be more convenient for him than to hunt up witnesses. Private account books of an individual to be admissible must be verified by the oath of him who made them, to the effect that they were made contemporaneously with the acts they record by one who had a knowledge of the transactions, and that they were kept in good faith; if that person be dead, the same must be shown by others and his handwriting proved. This is a great deal of trouble, but the safety it affords justifies its continuance. Even this rule, admitting private account books under such severe restrictions, is denied in many of the States, they rejecting them altogether. But no such strictness is required to admit the stock book under this rule of Payson v. Turnbull. It is enough to prove that they were the stock books of the company.[39] But there is no reason for this laxity. The very public nature of a corporation furnishes abundant means of proof. An attendance at a stockholder's meeting, a proxy in his own handwriting, a receipt for stock or for a dividend, a subscription contract, and a multitude of other acts requiring public recognition make

[31] Mudgett v. Horrell, 33 Cal. 25.
[32] Turnpike Road v. Van Ness, 2 Cranch C. C. 441.
[33] Plank Road v. Rice, 7 Barb. 157.
[34] Coffin v. Collins, 17 Me. 440; Whitman v. Church, 24 Me. 236.
[35] *Supra.*
[36] See *ante*, 2, 2d page.
[37] Hill v. Manch. & S. Water Works, *supra.*
[38] Hill v. Manch. Water Works, *supra;* Haynes v. Brown, *supra;* Birkenhead v. Brownrigg, *supra.*
[39] Glenn v. Liggett, 135 U. S. 333.

it far easier to prove a membership than many other issues of fact to which the rule of convenience has never thought of being applied. But even if there were anything in this reason, then it should be left to the legislature to fix the rule of admissibility, so that exception may be made in favor of the dead or insane.

On the other hand, the cases negativing the rule are founded in the most ancient and well-settled doctrines, some of which have become almost legal axioms.

BOOKS OF A CORPORATION NOT ADMISSIBLE TO PROVE PRIVATE RIGHT. Leading case: Marriage v. Lawrence.[40] This was an action brought against a water bailiff of Borough Malden to try his right to certain tolls. He being the lessee of the town, offered the public records of the borough containing an entry relative to a coaling vessel entering the borough without license, its consequent seizure and fine by order of borough council. This record entry was rejected by the lower court; rejection made ground of motion for a new trial. Counsel argued that this was a public record and the entry of a public nature. Court overruled motion, saying, Abbott, C. J.: "This was no more than a minute made by a party in his own memorandum book, making evidence for himself." Bayley, J.: "This falls within the rule which prohibits a party making evidence for himself. If corporations enter their own private acts in public court book that does not alter the nature of the entry."

In Brett v. Beales,[41] case involving the right of city to tolls, public records were offered to prove former enforcement of right; records rejected, and plaintiff argued on motion for new trial that there was a distinction between the books of a corporation to which all members of the corporation, and even an inhabitant, who was relator in *quo warranto*, though not a member, had access; but the court held that "no distinction existed in a case merely affecting the private rights of the corporation, between the books of a corporation, and of an individual.

SUCH ADMISSION VIOLATIVE OF COMMON LAW AND RULES OF EVIDENCE.—The leading case of Bain v. Whetmore,[42] arose under English statute making entry of a man's name *prima facie* evidence of his being a stockholder. The rule of the statute was criticised by Lord Brougham as follows: "A great privilege is bestowed by the act upon the company, neither more nor less than that of making evidence for itself. The books of the company are made evidence for the company, and unless rebutted by counter-evidence will be sufficient to sustain a verdict. It must be admitted that this is a great privilege and an exception to the ordinary rules of evidence. By these rules and the rule of common sense and justice, what a man writes is evidence against him, but not in his favor; but here the proposition is reversed, so that the company, by writing in the books that A B holds a certain number of shares, can go into court and make A B answerable for them, and can produce the entry as evidence against him." The court holds every provision of the act a "condition precedent" and not merely "directory" on account of its being an exception to the ordinary rules of evidence.

The recent case of Howard v. Glenn[43] discredits Turnbull v. Payson as follows: "We are aware that it has been held that the books of a corporation are admissible to show *prima facie* that the defendant was a subscriber to the stock of the company and was a stockholder therein; but while we do not think this ruling correct upon any reason or principle known to us, yet, under the facts of this case, we think the books were properly admitted in evidence (subscription being admitted). We know of no decision, however, which shows upon principle that such books are admissible without some special circumstances. We do not think that the case of Turnbull v. Payson,[44] a decision by Judge Clifford, to the effect that the books of a corporation are admissible in evidence to show that a person is a stockholder is correct. No reason is assigned in that decision, and none has been assigned in any decision which we have been able to find in either North Carolina or Alabama."[45]

SUCH A RULE ENABLES BASE AND DISHONEST PERSONS TO OPENLY ROB THE ESTATES OF DECEDENTS.—The manner in which this may be done is set forth most clearly in Thompson on Liability of Stockholders, § 370:

"Otherwise the secretary of a company, by entering a man's name as a shareholder on its books, might, without his knowledge or consent, make him a stockholder; and where death or other circumstances had rendered countervailing proof impossible, this unauthorized act of another might charge him or his estate with a serious burden. Men should be allowed to make their own contracts,; the courts should not, by establishing unreasonable rules, make contracts for them."

A very strong illustration of the capacity for evil in this rule is found in a recent decision of the United States Circuit Court in the case of Glenn v. Taussig's Executors.[46] In that case there was no subscription paper produced, no signature or writing of any character made or signed by decedents was given in evidence; it was shown that decedents constantly lived in Missouri more than a thousand miles away at the time the company was organized. The executors declared their entire ignorance of whether their intestates were stockholders; in short, the entire case rested on an entry of the firm name (misspelling decedents' names), on the stock books of

40 3 Barn. & Ald. 142.
41 1 M. & M. 416.
42 3 H. L. Cas. 22.
43 11 S. E. Rep. 610, Sup. Ct. of Georgia.
44 95 U. S. 413.
45 This decision was subsequent to Glenn v. Orr.
46 We believe the case is now pending on appeal to United States Circuit Court of Appeals

a corporation having its office in Virginia, and a draft drawn against said firm which was never paid. But yet the stock books were proved to be the stock books of the company, though not proved to have been regularly kept, and the court admitted the books and found against the executors upon this modicum of evidence, viewing the question as *stare decisis* by such decisions as Turnbull v. Payson. By this rule of evidence, also, a higher character is given to a copy than to its original, for it makes the copy of a decedent's name, transcribed from the original subscription and entered into the stock book, *prima facie* sufficient to charge his estate without further proof, whereas, before the original subscription could be so used, it would be necessary for the party seeking to enforce the obligation against the estate to prove that the signature was decedent's own signature. We submit that a rule of evidence that admits a mere copy of a name in a corporation's own stock book, which book has no other authentication than that it was kept by the secretary or book-keeper, but with no corroborating oath nor proof of regularity or *bona fides*, nor proof that copyist had personal knowledge of the facts, as alone *prima facie* sufficient to prove one a stockholder, who denies the fact, is a rule fraught with the gravest danger.

At this day corporations are no longer creatures of special legislative charter. Now, three men may organize for any amount under existing laws without supervision of court or legislature, and not be subjected to inconvenient questions. Now, when men's names are often written by proxies, when no yearly registration of stockholders is required, when transfers are made without supervision, when corporations abound, being now the rule, and individual and partnership concerns the exception, when any wild-cat or fraudulent scheme may incorporate without investigation or detection, there is certainly no easier mode of defrauding men of means than this rule offers. For if this evidence is sufficient to establish a *prima facie* case, it is also sufficient to support a verdict against a man's most positive denial, the jury being judges of the credibility of witnesses; and men of great wealth known to own stock in many companies are peculiarly liable to be thus mulcted in spite of their opposing oath. It will be a source of regret if our United States courts do not take the earliest opportunity to overrule the case of Turnbull v. Payson and confine the admissibility of the books of a corporation in their own behalf to their ancient channels.

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HUSBAND AND WIFE—SEPARATE MAINTENANCE.

HUNT V. HAYES.

Supreme Court of Vermont, General Term, Jan. 30, 1892.

Where a wife, living separate and apart from her husband, has sufficient income from an antenuptial agreement or settlement for her support, her husband is not bound to pay for necessaries furnished her. Munson, J., dissenting.

ROWELL, J.: The authority of a wife to pledge the credit of her husband for necessaries is usually regarded as delegated authority, and not as an inherent authority; and it is considered that if she binds him at all in this behalf she binds him only as his agent. But this authority or agency may be a presumption of law as well as an inference of fact; and it must be a presumption of law when an agency in fact, express or implied, is either not proved, or is expressly disproved, as is often the case. Thus, in Harrison v. Grady, 13 Law T. (N. S.) 369, it is said that when a wife is turned out of her home without the means of obtaining necessaries, it is an irrebuttable presumption of law that she has her husband's authority to pledge his credit for necessaries; but that, when husband and wife are cohabiting, it is a presumption of fact that she is his agent for ordering articles supplied to their establishment that are suitable to the station that he allows her to assume, but that, if they are not suitable to that station, a presumption arises that she was not his agent to pledge his credit for them. So, in Read v. Legard, 6 Exch. 636, where a husband was made liable for necessaries supplied to his wife during the period of his lunacy, Baron Alderson says: "If a wife is compelled by her husband's misconduct to procure necessaries for herself, as, for instance, if he drives her away from his house, or brings improper persons into it, so that no respectable woman could live there, then, according to the adjudged cases, he gives her authority to pledge his credit for her necessary maintenance elsewhere, which means that the law gives her authority by force of the relation of husband and wife." Baron Martin said that this is the true foundation of the liability, namely, that, by contracting the relation of marriage, a husband takes upon himself the duty of supplying his wife with necessaries, and that if he does not perform that duty, either through his own fault or in consequence of a misfortune of the kind in that case, the wife has, by reason of the relation, an authority to procure them herself, and that the husband is responsible for what is so supplied. This doctrine is pretty satisfactory; but we should be quite as well satisfied to say that in such cases the law treats the husband just as though he had in fact given the wife authority, the same as in the case of an implied promise, where the law does not really go upon the ground of a promise, but treats the party just as though he had promised, and this is what is meant by an implied promise. That a wife, wrongfully turned away by her husband without the means of supplying herself with necessaries, may pledge his credit for them, is undeniable. But the question that we have to consider is whether, when thus turned away, she can pledge her husband's credit for necessaries when she has an adequate income of her own with which she can supply herself.

The earliest case we have found on this question is War v. Huntly, 1 Salk. 118, which is this: An ordinary working man married a woman of like condition, and, after cohabiting for some time, the husband left her, and during his absence the wife worked, and, this action being brought for her diet, it was held by Lord Holt that the money she earned should go to keep her. The principle of this case is recognized in Johnston v. Sumner, 3 Hurl. & N. 261, though the case itself is not referred to. Pollock, C. B., then says: "If the husband turns his wife away, it is not unreasonable to say she has an authority of necessity, for by law she has no property and may not be able to earn her living; but we should hesitate to say, if a laboring man turned his wife away, she being capable of earning, and earning as much as he did, or if a man turned his wife away, she having a settlement double his income in amount, that in such cases the wife could bind the husband." But a precarious income is not enough. Thus, in Thompson v. Hervey, 4 Burrows, 2177, the wife, who had been sent adrift, had a pension of £300 a year from the crown, granted to her in her own name, but determinable at the pleasure of the crown; and it was held that she could pledge the husband's credit notwithstanding, for that the pension, being only a voluntary grace, and bound only during the pleasure of the crown, was not what any creditor of hers could be supposed to give her credit upon. Liddlow v. Wilmot, 2 Starkie, 86, is much relied upon by the defendant, and strongly denied to be in point by the plaintiff. But we think it in point. The original cause of the separation, which too place 30 years before suit brought, did not appear, but a reason for its continuance did appear, for the defendant had long cohabited with another woman, by whom he had a daughter 25 years old, consequently the wife was necessarily away; and this is what is said of the case in Johnston v. Sumner. So it was not a case of separation by mutual consent, as clearly appears by what was said in summing up. The wife had adequate means of her own, but it does not appear whence she derived them, much less that she derived them from her husband by way of an allowance on separation, as is claimed in argument to be the fair inference from the facts stated. Nor is there anything to show that the wife had forfeited her conjugal rights. Lord Ellenborough, in summing up, said: "The first question for consideration is whether the defendant turned his wife out of doors, or by the indecency of his conduct precluded her from living with him, for then he was bound by law to afford her means of support adequate to her situation; but, if either from her husband, or from other sources, she was possessed of such means, the law gives no remedy against the husband, but the idea of an implied credit is repelled." And this is undoubtedly the law of England. Blackburn, J., in Bazeley v. Forder, 9 Best & S. 599, puts it thus: "A wife, when separated from her husband in consequence of misconduct on his part rendering it improper for her to remain with him, is in the same position as if he turned her out of doors, and is by law clothed with power to pledge his credit for her reasonable expenses according to her husband's degree, unless she is in some other way supplied with the means of providing them." In this connection it is worthy of remark, if the husband's liability, when he turns his wife away, is put upon the ground of agency arising from necessity, as many of the cases do put it—Eastland v. Burchell, 3 Q. B. Div. 432—it logically follows that when there is no necessity there can be no agency, for *cessante ratione legio cessat ipsa lex;* and there can be no necessity when the wife has means of her own with which she can supply herself. Clifford v. Laton, 3 Carr. & P. 15, is understood by some to be to the same effect as Liddlow v. Wilmot. Mr. Smith so regards it in his 2 Lead. Cas. 438. It is so digested in 4 Jacob's Fisher's Digest, pl. 6041. And in Johnston v. Sumner, Pollock, C. B., cites it in connection with Liddlow v. Wilmot, and to the same proposition. And it is quite susceptible of the construction they give it, although it must be admitted that as the case is reported in Carrington & Payne that point does not very clearly appear. In Litson v. Brown, 26 Ind. 489, it is held that if a wife, living apart from her husband for just cause, has means of her own with which she can support herself, however derived, no necessity exists for others to supply her, and that the husband cannot be made liable except on an express promise to pay. Mr. Schouler, in his work on Husband and Wife (section 117), seems to recognize this case as law, for he cites it in support of the proposition that when a husband, by his misconduct, compels his wife to live apart from him, he is liable for her necessaries, notwithstanding his allowance, as long as that allowance is insufficient and she has no proper means of support. And we do not think that he elsewhere in his work controverts this doctrine. True, he says that antenuptial settlements cannot vary the terms of the conjugal relations, nor add to nor take from the personal rights and duties of the husband and wife. But he is speaking generally, and without reference to the question we are considering; and what he says is true as a general proposition, both in England and in this country. Indeed, we find little or no authority in this country opposed to the view here taken of this question. But in cases like the one before us it is for the jury to say whether the wife has adequate means or not for her support.

As to the defendant's liability for the support of his child it does not appear why the child is with the mother, whether with defendant's consent and approval or against his will and wishes. It may be with her in a way to charge the defendant for its support; but whether it is or not we cannot determine on this record. As to the law of the subject see Rawlyns v. Vandyke, 3 Esp. 250; Bazeley v. Forder, 9 Best & S. 599; Gill v. Read, 5 R. I. 343; Reynolds v. Sweetser, 15 Gray,

78. The case of Gordon v. Potter, 17 Vt. 348, which holds that a father is not liable for necessaries furnished to his minor child except upon his promise, express or implied, to pay for them, is not opposed to these cases, for they also go upon the ground of an implied promise. Judgment reversed, and cause remanded.

Munson, J., dissents.

NOTE.—*Liability of Husband for Necessaries furnished the Wife.*—The husband is bound by law to maintain his wife in the manner suitable to his estate and condition and if he fails to supply that maintenance, except under certain circumstances which justify him in withholding it, she may be entitled from necessity to pledge his credit to that extent. 2 Lawson's Rights, Remedies and Practice, 1322, citing Manby v. Scott, 2 Smith Lead. Cas. 375; Morrisson v. Holt, 42 N. H. 478, s. c., 80 Am. Dec. 120. Nor can the husband revoke or deprive her of such authority even by express notice to the party who supplies her. Bolton v. Prentice, 2 Strange. 1214. She is considered his agent with uncountermandable authority to order the necessaries on his credit. Jenner v. Morris, 3 De Gex, F. & J. 51. The husband who fails to furnish his wife with necessary supplies is not excused from liability to one who does so furnish by having given him a notice that he should not pay for anything not furnished on his written order. Pierrepont v. Wilson, 49 Conn. 456. A notice given by a husband to a merchant not to sell goods to his wife on credit, will not relieve the husband from liability for necessaries sold the wife and charged to the husband, where the husband fails to furnish such necessaries. McGrath v. Donnelly (Pa.), 20 Atl. Rep. 382. If a husband by his conduct compels his wife to leave his house she has power to pledge his credit for her necessary maintenance elsewhere. Houliston v. Smyth, 3 Bing. 127; Hancock v. Merrick, 10 Cush. 41; Mayhew v. Thayer, 8 Gray, 172; Reynolds v. Sweetzer, 15 Gray 78; Hultz v. Gibbs, 66 Pa. St. 360; Billing v. Pitcher, 7 B. Mon. 458, 46 Am. Dec. 523; Schrock v. Schrock, 4 Bush, 684; Mitchell v. Treanor, 11 Ga. 324, 56 Am. Dec. 421. So where he abandons her. Eiller v. Crull, 99 Ind. 375; Carstens v. Hanselman, 61 Mich. 426. So if the husband introduce into his house an improper woman with whom his wife could not reside. Curwen v. Maguire, Hayes & J. 178; Houliston v. Smyth, 3 Bing. 127; Horwood v. Heffer, 3 Taunt. 421. Or if he so illtreat his wife that through reasonable apprehension of further violence she was obliged to leave. Hunt v. De Blaquiere, 5 Bing. 550; Montague v. Benedict, 3 Barn. & C. 635. But it is not necessary that she should have been actually turned out of doors and it is enough that he has caused her to be in bodily fear of living with him. Baker v. Sampson, 14 Com. B. (N. S.) 383. And so if she were merely turned out in effect as by selling all the furniture, breaking up his establishment and going himself to live in lodgings. Forristall v. Lawson, 34 L. T. (N. S.) 903. But if the wife of her own fault deserts her husband and refuses to live with him her authority as his agent ceases, especially if she also commit adultery. McCutchen v. McGahay, 11 Johns. 281, 6 Am. Dec. 373; Henderson v. Stringer, 2 Dana, 292; Hunter v. Boucher, 3 Pick. 289; Olnson v. Heritage, 45 Ind. 73; Bevier v. Galloway, 7 Ill. 517; Sturtevant v. Starin, 19 Wis. 268; Brown v. Mudgett, 40 Vt. 68; Porter v. Bubb, 25 Mo. 36; Billing v. Pilcher, 7 B. Mon. 458, 46 Am. Dec. 523; Gill v. Read, 5 R. I. 543, 73 Am. Dec. 73; Thome v. Kasham, 51 Vt. 520. Thus the husband s not liable for necessaries furnished to his wife unless it appears that he turned her away without cause; and persons furnishing the same do so at their peril. Walker v. Simpson, 42 Am. Dec. 216. But if she offers to return and the husband refuses to receive her, his liability is then revived notwithstanding a general notice not to trust her. McCutchen v. McGahay, 11 Johns. 281; and the husband is also liable for the necessaries furnished his wife during their separation though the separation be by agreement if she offered to return and he refuses to receive her and has provided no means for her support. Cunningham v. Warner, 17 Serg. & R. 247. And though the general rule as laid down in the principal case seems to be that where the wife living separate in consequence of her husband's misconduct is possessed of a sufficient maintenance of her own, no matter from what source derived, sufficient for her support, the husband will not necessarily be liable; it is otherwise if she is dependent for her allowance on a person who is not bound to pay it. Whitmore v. Gale, Black. & O. 199; Ewers v. v. Holton, 3 Esp. 255; Burrett v. Booty, 8 Taunt. 343. One who has received into his house a woman and her child who have been forced to leave their home through the cruelty of the woman's husband, cannot recover from the husband for their maintenance if one of his motives for receiving the woman was that he might maintain an adulterous intercourse with her. Almy v. Wilcox, 110 Mass. 443. The wife has no authority to pledge the husband's credit if she be sufficiently supplied by him with necessaries fitted for her station or she have a separate allowance for their purchase. Jolly v. Rees, 15 Com. B. (N. S.) 628; Richardson v. Du Bois, L. R. 5 Q. B. 51; Mott v. Comstock, 8 Wend. 544; Kimball v. Keyes, 11 Wend. 33; Baker v. Barney, 8 Johns. 72, 5 Am. Dec. 326; Cromwell v. Benjamin, 41 Barb. 558; Carey v. Patton, 2 Ashm. 140; Furlong v. Hyson, 35 Me. 332; Rea v. Durkee, 23 Ill. 503; Olnson v. Heritage, 45 Ind. 73, 15 Am. Rep. 258; Alley v. Winn, 134 Mass. 77, 45 Am. Rep. 297. And he is not liable after she has obtained a decree against him for alimony. Bennett v. O'Fallon, 2 Mo. 69, 22 Am. Dec. 440, and he duly pays the amounts fixed by the court to her. Crittenden v. Schermehorn, 39 Mich. 661, 33 Am. Rep. 440; Hare v. Gibson, 32 Ohio St. 33; and persons dealing with the wife under these circumstances do so at their own peril and are chargeable with knowledge of the alottment and payment of the alimony. Hare v. Gibson, *supra*. Where the evidence fails to show that the wife had a separate estate or business a note signed by her given for supplies for the support of the family is the debt of the husband alone, he being bound to furnish such supplies. O'Malley v. Ruddy (Wis.), 49 N. W. Rep. 116. Under Revised Stat. Mo. 1879, Sec. 3296, which provides that the wife's personal property shall be her separate property and shall not be liable to be taken for the debts of the husband but such property shall be subject to execution for any debt of her husband for necessaries for the wife or family, a wife's separate property cannot be seized on execution under a judgment against the husband alone, even though the judgment was for necessaries. Bedsworth v. Bowman (Mo.), 15 S. W. Rep. 990.

What are Necessaries and What are Not.—What are or what are not necessaries for which the husband is liable is a question of fact depending upon the estate, condition and circumstances of the parties; all reasonable expenses are included suitable to his rank and position. Hall v. Weir, 1 Allen, 261; Park v. Kleeber, 37 Pa. St. 251. The following have been held to be necessaries: Costs of binding the husband over

to the peace, Grindell v. Godmond, 5 Ad. & El. 755; costs of divorce and legal proceedings against the husband, Wilson v. Ford, L. R. 3 Exch. 63; Porter v. Briggs, 38 Iowa, 166; Sprayberry v. Merk, 30 Ga. 81; Warner v. Heiden, 28 Wis. 517; Conant v. Burnham, 133 Mass. 503; dentistry, Freeman v. Holmes, 62 Ga. 556; Gilman v. Andrews, 28 Vt. 241; food, Walker v. Simpson, 2 Woods & S. (Pa.) 83; clothing, Freestone v. Butcher, 9 Car. & P. 643; lodging, Rotch v. Miles, 2 Conn. 638; furniture for a house, Hunt v. De Blaquiere, 5 Bing. 550; Heney v. Sargent, 54 Cal. 396; jewelry such as persons in the wife's station were accustomed to wear, Raynes v. Bennett, 114 Mass. 424; medicines and medical attendance, Mayhew v. Thayer, 8 Gray, 172; Cothran v. Lee, 24 Ala. 380; Spaun v. Mercer, 8 Neb. 357; Carstens v. Hanselman, 61 Mich. 426; servants, Bazely v. Forder, L. R. 3 Q. B. 562.

The following have been held not necessaries: Articles beyond the husband's circumstances and his place in society, Carey v. Patton, 2 Ashm. 140; Phillipson v. Heyter, L. R. 6 C. P. 38; medical services of a quack doctor, Wood v. O'Kelley, 8 Cush. 408; money loaned to her even for the purpose of obtaining necessaries, Walker v. Simpson, 7 Woods & S., 83; But *contra*, Kenyon v. Ferris, 47 Conn. 510. Rent of a pew in church, St. John's Parish v. Johnson, 40 Conn. 75. As to whether counsel fees in a suit for divorce or to enforce a marriage settlement are necessaries chargeable against the husband, the authorities are in conflict. See 2 Lawson's Rights, Remedies and Practice, page 1320, and cases cited. A recent Iowa case holds that the law does not imply a promise on the part of a husband to pay for legal services rendered to the wife in prosecuting an action for divorce where it does not appear that the grounds of her complaint were true or the expenses necessary. Sherwin v. Maben (Iowa), 43 N. W. Rep. 292.

BOOK REVIEWS.

RICE ON EVIDENCE.

That a modern American work upon the subject of evidence has been greatly demanded by the profession of late goes without saying. Without detracting from the great merits of English works like Best, Phillips, Taylor and Starkie, and of American works like Greenleaf and Wharton, it may reasonably be claimed that none of them come up to the requirements of the modern practitioner. The English works named were written for a generation gone, and are too distinctly English to suit American practitioners of the present day. Of the American authorities, Greenleaf and Wharton, the former owing to the crude and inceptive condition of our jurisprudence, was confined largely to English precedent for principle and authority. He wrote with rare discernment and classic elegance of diction, but from the stand-point of fifty years ago, and much of the scholarly suggestion and research of his time has become utterly useless. The same may in large measure be said of the work of Dr. Wharton, whose metaphysical distinctions and mediæval researches, though interesting and admirable, are not calculated to meet the demands of modern students and practitioners. Hence it is easy to be seen that a work on evidence, properly constructed and grounded upon modern practice, is a welcome edition to American legal literature.

The author of this work states that "it is a notorious fact among the American judiciary, a fact sustained by abundant *data*, that fully four-fifths of the cases in the appellate courts allege, as matter of reversible error, the erroneous reception or rejection of some evidenciary fact that the respective counsel offered to prove. This fact alone is a practical demonstration of the uncertainty and contradiction that prevail in the present law on this subject, and unmistakably indicates the demand for some standard of authority that will assist in harmonizing the discrepancies that pervade the federal and State decisions." The claim made for the work is that it is distinctly and eminently American, that it presents an analysis of the subject in all its branches, and embraces a wide range of authority, as is best evidenced by the fact that nearly ten thousand decisions are cited and discussed. The author disclaims anything whatever speculative or argumentative about the text, but on the contrary claims that it is rather a somewhat elaborate attempt to state what has been decided—what the law is, not what in the writer's opinion the law should be. In general, the author has left any apparent contradictions in the citations without even an attempt at reconcilement, leaving the practitioner to draw those lines of demarkation and comparison which seem most logical.

It would be impossible within the limits of this review to give a clear or discriminating idea of the subject or character of these two volumes of about 700 pages each. The arrangement of the subject from beginning to end we regard as very good. The various divisions of the subject into their subheads and subtitles has evidently been done by a thoughtful mind, and we cannot upon this examination see that anything has been omitted which should properly belong to a work upon the subject of evidence. Again, the citation of authorities seems to be complete and exhaustive. Many will differ as to the expediency or effectiveness of the plan pursued in the avoiding of notes and in the placing of citation of cases in the body of the text. We do not like it ourselves, and doubtless many practitioners will agree with us. The use of foot-notes is valuable as saving time to the searcher if nothing else, and we regret to see any disposition to do away with it.

It would be unfair to say that the work is a mere digest, or rather a mere compilation from the *syllabi* of reporters of the law it embodies, and yet in one sense this is true. A book which undertakes to state barely what the law is, as laid down by the authorities cited, but which fails to contain the views of the author upon controverted questions, and which, as this avowedly does, contains nothing "speculative or argumentative about the text," must be more or less a mere digest. It may be a very good and substantial digest of the authorities, as this one undoubtedly is, but it is none the less a digest. In saying this we do not mean to impugn the value or merit of the work. A first-class digest is as rare as a first-class text-book, and many practitioners prefer a work which aims to tell them what the law is without speculation or suggestion, unless in the very rare instances of an author of high and commanding authority. Therefore, in saying that this work strikes us as being a first-class and exhaustive digest of the law of evidence, arranged not as digests usually are, but in the form of a text-book, with sections and section heads, we think we do full justice to the work.

Practitioners will undoubtedly find within its pages ample ground of research and study. It has a good index and the book is well printed. It is published by the Lawyers' Co-operative Publishing Company, Rochester, N. Y.

QUERIES.

QUERY NO. 10.

A gives a note to B for the sum of $100, payable twelve months after date, with interest at the rate of ten per cent. per annum, secured by a chattel mortgage on household goods of even date. One month after the execution of the note and mortgage, A offers to pay the note with interest to maturity, and requests a satisfaction of the mortgage. B refuses to accept payment and to satisfy the mortgage. A, upon refusal, makes a valid tender of the face of the note with interest to maturity, and keeps his tender good. A desires to leave the State, and the mortgage covering the household goods he desires to have released so he can sell some of the property for means to go with, and to take the remainder along with him. Under Minnesota statutes it is criminal to sell or abscond with chattels that are mortgaged. Query: 1st. Does this tender satisfy the debt, and can B be compelled to accept the same? 2d. Can B be compelled to satisfy the mortgage immediately upon the tender? If so, what are the proceedings? Please cite authorities.

G. L. S.

QUERY NO. 11.

A gives a bond conditioned upon the operation of a certain street car line for three years. At the end of two years the cars are taken off and the line apparently abandoned. What is the measure of damages, the bond being given to B, who owns forty lots along the line?

G. E. H.

QUERY NO. 12.

Under the laws of Missouri regulating cities of the fourth class, does the right of appeal lie in behalf of the city from a verdict of acquittal by a jury in the mayor's court?

A. W. J.

HUMORS OF THE LAW.

A good story is gotton off on the legal profession, which runs about as follows:—

In a certain community a lawyer died who was a most popular and worthy man; and among other virtues inscribed upon his tombstone was this:

"A lawyer and an honest man."

Some years after a Farmer's Alliance convention was held in the town; and one of the delegates, being of a sentimental turn, visited the "silent city," and in rambling among the tombs was struck with the inscription: "A lawyer and an honest man."

He was lost in thought, and when run upon by a fellow-hayseed, who, noticing his abstraction, asked if he had found the grave of a dear friend or relative, said: "No, but I am wondering why they came to bury these two fellows in the same grave."

Judge. Gentlemen of the jury, your verdict is decidedly mixed.

Foreman. Yes, your honor; it is in accordance with the evidence.

An old farmer from one of the back counties was the defendant in a suit for a piece of land, and he had been making a strong fight for it. When the other side began his speech, he said:

"May it please the court, I take the ground—"

The old farmer jumped up and sung out:

"What's that? What's that?"

The judge called him down.

"May it please the court," began the attorney again, not noticing the interruption, "I take the ground—"

"No, I'll be d——d if you do, either," shouted the old farmer, "anyhow not until the court decides the case."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Accounting.—Parties claiming to be sole heirs of a deceased have no right to demand an account of the administration of the succession, although they attack a judgment homologating an account, where it appears that the parties sued for the account has been discharged as administrator, and the order discharging him is not assailed, and the person to whom the residue of the estate was paid, and who had been recognized as the sole heir of the deceased, is not made a party defendant.—*Baron v. Baum*, La., 10 South. Rep. 766.

2. ADMINISTRATION—Compensation of Administrator.—Where an administrator contracts to settle an estate for $150, a subsequent agreement between the heirs that the widow shall have the control and use of all decedent's property, money excepted, for life, relieving the administrator from the care of the personalty, and providing that he shall sell and distribute the residue after her death, which occurs two years later, only defers his work, and does not increase his duties so as to entitle him to extra compensation.—*In re Koch's Estate*, Penn., 23 Atl. Rep. 1057.

3. ADMINISTRATION—Powers of Executrix.—An executrix has no power, without the sanction of the probate court, to bind the estate by contract, even for the necessities of infant devisees.—*Roscoe v. McDonald*, Mich., 51 N. W. Rep. 939.

4. ADMINISTRATION — Sale of a Decedent's Land.—Where a petition is filed in the county court asking that certain land, the property of a decedent, be sold to pay the decedent's debts, and his widow files an answer setting up title in herself, the county court may decree the land to be sold when it appears from the record to belong to the decedent, but it has no power to deter-

mine questions of conflicting title, and its decree will not operate as *res judicata* in a subsequent action in the court of chancery by the widow, to have the title of the purchaser at the sale ordered by the county court canceled as a cloud.—*Walsh v. Crook*, Tenn., 19 S. W. Rep. 19.

5. ADMIRALTY — Maritime Liens.—Under the general maritime law, no lien exists for supplies furnished at the port of a State of which the ship-owner is a resident, and *quære*, whether the rule is not the same where part of the owners reside in the State in which is situated such port, and others reside in foreign States, the facts being known to the party furnishing the vessel.—*The Samuel Marshall*, U. S. D. C. (Mich.), 49 Fed. Rep. 754.

6. APPEAL - Review—Harmless Error.—Where an action is tried by the court without a jury, and there is ample legal evidence introduced to sustain the judgment, the judgment will not be reversed for errors in the admission of evidence.—*Laumier v. Gehner*, Mo., 19 S. W. Rep. 82.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Set-off.—A bank has the equitable right to set-off, against deposits made with it by an insolvent before making an assignment for the benefit of creditors, notes payable to it from the insolvent, though at the time of the assignment the notes are not yet due.—*Nashville Trust Co. v. Fourth Nat. Bank*, Tenn., 18 S. W. Rep. 822.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A deed, assigning real estate for the benefit of creditors, conveys to the assignee the right to the actual possession of such real estate.—*Taylor v. Bruner*, Ind., 30 N. E. Rep. 834.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Under Rev. St. (Sanb. & B.) § 1701, providing that the order made by the court for final settlement of the accounts of an assignee for the benefit of creditors "shall be conclusive on all parties" subject to the right of appeal, creditors who have proven their claims, cannot attack such order by an action to have the assignment set aside as fraudulent.—*Lawson v. Stacy*, Wis., 51 N. W. Rep. 961.

10. ATTACHMENT — Fraudulent Conveyance.—Where plaintiff sues out an attachment on the ground that defendants have executed a deed with intent to defraud plaintiff and other creditors, the burden is on him to show the existence of fraud.—*Burruss v. Trant*, Va., 14 S. E. Rep. 845.

11. ATTORNEY AND CLIENT—Arbitration.—The plaintiff's attorney has authority to refer the matter in controversy in a pending suit to arbitration without the special permission of his client.—*McElreath v. Middleton*, Ga., 14 S. E. Rep. 906.

12. BAILMENT—Negligence.—A gratuitous bailee is liable for injury to property intrusted to his care, occasioned by gross negligence.—*Burk v. Dempster*, Neb., 51 N. W. Rep. 976.

13. BANKRUPTCY— Discharge.—A discharge in bankruptcy can be pleaded in bar of a suit on a judgment on a claim provable in bankruptcy, obtained in a State court before the discharge, but after the commencement of bankruptcy proceedings.—*Locheimer v. Stewart*, Tenn., 19 S. W. Rep. 21.

14. BOND—Clerk of Court.—Since it is the duty of the clerk of the circuit court to pay over to his successor all moneys in his hands as clerk at the expiration of his term, failure to do so is a breach of his official bond; and his successor, since he has a right to demand and receive the same, and hold it in trust, is injured by such failure, and may maintain an action on the bond under Rev. St. § 985.—*Mulholland v. Gerry's Estate*, Wis., 51 N. W. Rep. 960.

15. CONSTITUTIONAL LAW—Compensation to Fire Companies. — To accomplish such protection, and as a means of securing greater efficiency in the fire departments and service of the State, the legislature may lawfully offer, by general law, a compensation or reward to such fire companies as will comply with conditions therein named designed to promote their usefullness and competency; an acceptance and compliance with such conditions constitute a sufficient consideration for an appropriation by the legislature to redeem such promise.—*Cutting v. Taylor*, S. Dak., 51 N. W. Rep. 949.

16. CONSTITUTIONAL LAW—Due Process.—A proceeding in a personal action against absent defendants by substituted service through a curator *ad hoc*, unaccompanied by any seizure of property, is not "due process of law," and the judgment and sale thereunder are absolute nullities. The case is not affected by the fact that such a proceeding had been recognized as valid by prior decisions of this court, especially when, prior to the date of the proceedings the Supreme Court of the United States had repeatedly condemned such proceedings as not "due process" under the constitution of the United States.—*Hopson v. Peake*, La., 10 South. Rep. 762.

17. CONSTITUTIONAL LAW—Regulation of Commerce.—Act Feb. 18, 1891, entitled "An act to regulate the planting and taking of oysters in the waters of this State," which makes it unlawful for any person not a resident of the State to take or transport oysters from, in, or through any of the waters of the State, or for any person, whether a citizen of this State or of any other State or country, "to ship beyond the limits of this State any oysters taken from the waters of this State while the same are in the shells," etc., is not in contravention of Const. U. S. art. 1, § 8, subd. 3, as a regulation of interstate commerce.—*State v. Harrub*, Ala., 10 South. Rep. 752.

18. CONSTITUTIONAL LAW—Special Laws.—Act May 23, 1889, § 10, art. 5, which provides a system of government of all cities of the third class, regulating the manner in which the power to pave streets and collect the costs thereof shall be exercised, authorizing the assessment of the costs on the property fronting on the street according to the extent of frontage, creating a lien therefor, etc., is not a local or special act within the meaning of Const. art. 3 § 7, which prohibits the general assembly from passing local or special laws authorizing the creation or impairing of liens.—*City of Scranton v. Whyte*, Penn., 23 Atl. Rep. 1043.

19. CONTRACT—Cancellation.—Where a step-son, who is executor of his father's will, induced his step-mother to take title to real estate which he sells under the will, and then to convey it to him, and to give to him promissory noets, which she holds against others in her own right and money and also her own promissory note upon the verbal promise upon his part that he will discharge a mortgage lien upon the premises, but which she is under no obligation to pay, and upon his further verbal promise that she may remain in the homestead during the rest of her life, it will be declared voidable by her.—*Lamb v. Lamb*, N. J., 23 Atl. Rep. 1009.

20. CONTRACT—Partition.—An agreement between cotenants of land that neither they nor their heirs or assigns shall ever institute suit for the partition of the property is void as being an unreasonable restraint on the enjoyment of property.—*Haeussler v. Missouri Iron Co.*, Mo., 19 S. W. Rep. 75.

21. CONTRACT—Performance.—The provision in a contract for railroad grading that the measurements and calculations by the railroad company's chief engineer of the quantity and amount of the several kinds of work, and his classification of the materials contained in excavations, shall be final and conclusive, is a valid provision, and is binding upon the parties to the agreement, and there can be no recovery in excess of his final estimate, in the absence of fraud, gross error, or mistake.—*Lewis v. Chicago, S. F. & C. Ry. Co.*, U. S. C. C. (Mo.), 49 Fed. Rep. 708.

22. CORPORATION — Directors.—Where a corporation holds a leasehold interest in land, with the privilege of purchasing the fee, an assignment of such privilege to one of the directors, and his purchase of the fee by means of it, are valid as against the corporation, where

it appears that it had neither the money nor the credit necessary for making the purchase.—*Hannerty v. Standard Theater Co.*, Mo., 19 S. W. Rep. 82.

23. CORPORATIONS—Stock—Lien.—A corporation has no lien, unless created by statute or its charter, on the stock of a stockholder, to secure a debt due by the stockholder to the corporation, and cannot resist or prevent a transfer of the stock.—*Gemmell v. Davis*, Md., 23 Atl Rep. 1032.

24. CORPORATIONS — Right of Stockholders. — Where all the stock of a corporation is owned by three persons, an agreement by which two of them agree to buy the stock owned by the third, to be paid for in part by the proceeds of a note given by the corporation, and the residue by notes of the vendees, which they agree, as between themselves, shall be paid for out of the earnings of the company, is valid.—*Schilling & Schneider Brewing Co. v. Schneider*, Mo., 19 S. W. Rep. 67.

25. COUNTIES—Boarding Prisoners—Liability.—In recovering compensation for boarding prisoners, no discrimination is to be made between those committed for a violation of the criminal laws of the State and the penal ordinances of a city of the metropolitan class, and the county will be liable to the sheriff for such compensation.—*Douglass County v. Coburn*, Neb., 51 N. W. Rep. 965.

26. COUNTY BOARDS—Claims—Mandamus.—*Mandamus* will issue in a proper case to compel a county board to act upon a claim against the county, where final action has been refused; but in a proceeding in *mandamus* the court will not determine the validity of any offset set up by the county.—*State v. Slocum*, Neb., 51 N. W. Rep. 969.

27. COVENANTS IN DEED—Public Policy.—A covenant in a deed not to convey or lease land to a Chinaman is void, as contrary to the public policy of the government, in contravention of its treaty with China, and in violation of the fourteenth amendment of the constitution, and is not enforceable in equity.—*Gandolfo v. Hartman*, U. S. C. C. (Cal.), 49 Fed. Rep. 181.

28. CRIMINAL LAW—Burglary.—Rev. St. § 3526, defines burglary in the second degree to be the breaking and entering—"second, any shop, store, booth, tent, warehouse, or other building in which there shall be at the time any goods, wares, or merchandise kept or deposited, with intent to steal therein:" *Held*, that a railroad "depot" was included under the general words "other building."—*State v. Edwards*, Mo., 19 S. W. Rep. 91.

29. CRIMINAL LAW — Forgery.—Under Rev. St. § 2384, which provides that "all contracts, which by the common law are joint only, shall be construed to be joint and several," there is no variance where an indictment for forgery describes a note signed by several persons as "purporting to be the act of one."—*State v. Flora*, Mo., 19 S. W. Rep. 95.

30. CRIMINAL LAW — Jury.—Where a defendant, who has been admitted to bail in a criminal case, is temporarily absent from the court room while the jurors are being examined, and his counsel, who is present, does not object to any of the jurors, nor suggest even that the defendant is not present, an alleged error in accepting a juror will not be considered.—*State v. Brewer*, Mo., 19 S. W. Rep. 96.

31. CRIMINAL LAW—Manslaughter.—One who is convicted of manslaughter in the fourth degree cannot complain of a failure to instruct the jury on manslaughter in the third degree.—*State v. Grote*, Mo., 19 S. W. Rep. 98.

32. CRIMINAL LAW—Writ of Error.—A writ of error in a criminal cause is not a writ of right, and does not issue as a matter of course on the application of the party convicted, but only upon the judicial allowance by a court, justice, or judge having authority to allow the same.—*State v. Mitchell*, Fla., 10 South. Rep. 746.

33. CRIMINAL PRACTICE — Larceny — Misjoinder.—An indictment for larceny against joint defendants, which charges them with conspiring together for the purpose of committing larceny, and then charges the actual commission of the larceny upon them, is not objectionable, as joining a count for larceny and a count for conspiracy in the same indictment.—*Anthony v. Commonwealth*, Va., 14 S. E. Rep. 834.

34. CRIMINAL PRACTICE—Uttering Forged Instrument.—An indictment charging the utterance and publishing of a forged instrument should state the name of the person, firm, corporation, or company to or upon whom the same was uttered, published, or passed; or else it should account for the omission by a statement in the indictment that such person, etc., is to the jurors unknown. If it fails to do either, it is fatally defective.—*Goodson v. State*, Fla., 10 South. Rep. 738.

35. CRIMINAL TRIAL — Homicide—Defendant as Witness.—Where a defendant was sworn in his own behalf, though he confined his testimony to the single question of self-defense, he thereby became a witness in the case, and Act March 24, 1885, § 1, which provides that the failure of one charged of crime to testify in his own behalf shall not create a presumption against him, does not prevent the prosecuting attorney commenting on defendant's failure to deny certain testimony in relation to facts of which he must have had knowledge.—*Lee v. State*, Ark., 19 S. W. Rep. 16.

36. DEATH BY WRONGFUL ACT—Conflict of Laws.—An action to recover damages for a death caused by the wrongful act of another, though statutory only, is transitory in its nature; and where plaintiff's intestate was killed, through defendant's negligence, in West Virginia, plaintiff properly instituted his action to recover damages therefor in the State of Virginia, where defendant was found, the right to recover in such case to be governed by the law of West Virginia; such law not being inconsistent with the laws or policy of the State of Virginia.—*Nelson's Adm'r. v. Chesapeake & O. Ry. Co.*, Va., 14 S. E. Rep. 838.

37. DEED—Boundaries.—In a deed conveying land by metes and bounds, one of the boundary lines was described as extending "to a post standing on the south side of said Windsor Mill road; thence bounding on this road north, 87 degrees west," etc.: *Held*, that the deed did not convey the fee to the center of the road.—*Hunt v. Brown*, Md., 23 Atl. Rep. 1029.

38. DEED AS SECURITY.—When one borrows money from a bank to pay for land, gives his negotiable promissory note to the bank for the money, and causes a conveyance of the land to be made to the president of the bank, such conveyance being absolute, but intended only as security for the payment of the loan, it is no cause for setting the deed aside that the borrower intended that it should be made to the bank, and not to its president, and that to this extent the transaction was on his part a mistake.—*Dotterer v. Freeman*, Ga., 14 S. E. Rep. 863.

39. DEPOSITION — Notarial Seal.—The omission of the official seal to the certificate of authentication of a deposition taken before a notary public in another State in pursuance of sections 36, 37, ch. 73, Gen. St., *held* to be an informality merely, under section 39 of the same chapter, and not alone sufficient to warrant the rejection of the deposition on the trial.—*Rachac v. Spencer*, Minn., 51 N. W. Rep. 920.

40. DESCENT AND DISTRIBUTION.—Upon proceedings to partition the land of an intestate among his heirs, the land was sold, and the proceeds paid into court for distribution. The share of one of the heirs in this fund was claimed by his creditors, who had obtained judgment after the intestate's death, but before the adjudication. The heir was indebted to the intestate in an amount larger than his share of the fund: *Held*, that the creditors had no right to the fund, since the debt due the intestate was entitled to be paid first.—*Appeal of Cheyney*, Penn., 23 Atl. Rep. 1053.

41. DIVORCE—Agreement.—An agreement between a man and his wife, made the day after he has been awarded a decree of divorce, whereby he agrees to pay her an annuity of $75 per month during her life, in consideration of her not moving for a new trial, is void,

as tending to facilitate a divorce.—*Blank v. Nohl*, Mo., 19 S. W. Rep. 65.

42. DOWER — Deed.—Under a statute which provides that the deed of the husband alone shall not "prejudice the right and interest of the wife," or bar her of her dower, a deed of the former of a right of way to a railroad company does not bar the latter's dower in the easement created.—*Venable v. Wabash W. Ry. Co.*, Mo., 19 S. W. Rep. 45.

43. EASEMENT—Statute of Frauds.—Defendant, the owner of a ferry, and land used as a landing, agreed with plaintiff orally that if he would buy a tract of land adjoining defendant, and conduct a warehouse thereon, and store defendant's frieght free of charge, he (defendant) would never suffer any one to put up a warehouse on his land. Plaintiff, acting under this contract, bought the land, erected a warehouse, and stored defendant's freight free of charge for a number of years, after which defendant erected a warehouse on his own land, and ran the same in opposition to plaintiff: *Held*, in an action for relief, that the contract, purporting to create a servitude or easement on defendant's land, was void within the statute of frauds.—*Clanton v. Scruggs*, Ala., 10 South. Rep. 757.

44. EJECTMENT—Attornment by Tenant.—A landlady executed a writing, whereby she released her tenant from the lease held from her, and surrendered possession to another person's lessee, and who had sublet the premises to her tenant, in consideration of her being released from all claims because of her having occupied and excavated the same: *Held*, that the effect of said instrument was to divest her of possession.—*Dausch v. Crane*, Mo., 19 S. W. Rep. 61.

45. EMINENT DOMAIN—Compensation.—In proceedings to condemn a right of way for a public boulevard across railroad tracks, where it appeared that the crossing of such boulevard rendered the company's warehouse, and the land on which it was located, less available and less valuable for the purposes for which it was constructed and used, this was a proper element of damages, and should have been submitted to the jury.—*Commissioners of Parks and Boulevards of Detroit v. Detroit & C. G. T. J. R. Co.*, Mich., 51 N. W. Rep. 934.

46. EMINENT DOMAIN — Damages — Limitations.—Rev. St. 1881, §§ 905-912, provide that the owner of land taken by a railroad for right of way "may have a writ for the assessment of damages." Section 292 provides that actions "for injuries to property, damages for any detention thereof, shall be commenced within six years." Section 294 provides that "all actions not limited by any other statute shall be brought within 15 years," *Held*, that the proceeding under sections 905-912, being purely a statutory remedy, is not barred by section 292, but is governed by section 294.—*Shortle v. Louisville, N. A. & C. Ry. Co.*, Ind., 30 N. E. Rep. 639.

47. EMINENT DOMAIN—Judgment—Collateral Attack.—Condemnation proceedings cannot be collaterally attacked for misjoinder of parties defendant, or for omission to recite, in the order appointing commissioners, that they are disinterested, since these matters are not jurisdictional. — *Thompson v. Chicago, S. F. & C. Ry. Co.*, Mo., 19 S. W. Rep. 77.

48. EMINENT DOMAIN— Raising Canal dam.—Where a corporation clothed with the power of eminent domain, after having purchased a canal and dam connected therewith, constructed by the commonwealth, raises the height of the dam by means of permanent splash boards, and thereby causes the water to overflow adjoining land, it is liable to the owners of the land for damages, under Const. art. 16, § 8.—*Fredericks v. Pennsylvania Canal Co.*, Pa., 23 Atl. Rep. 1067.

49. EVIDENCE—Books of Account.—An account-book of original entries, fair on its face, and shown to have been kept in the usual course of business, is admissible in evidence even in favor of the person by whom it is kept.— *Anchor Milling Co. v. Walsh*, Mo., 18 S. W. Rep. 904.

50. EXECUTION.—When an execution has been quashed at the instance of a claimant as defective because not conforming to the judgment, the clerk may issue another execution which does conform to the judgment; and whether it be called an original or an *alias* makes no difference. — *Westbrook v. Hays*, Ga., 14 S. E. Rep. 879.

51. EXECUTION SALE — Validity.— In an action to recover the possession of land by the grantee under a sheriff's deed, where the validity of the sale is attached by a cross complaint, the attack is direct, rather than collateral.—*Branck v. Foust*, Ind., 30 N. E. Rep. 631.

52. FEDERAL COURTS— Jurisdiction of Supreme Court. —Rev. St. D. C. § 846, giving the same right of appeal from the supreme court of the district as is "provided by law" for appeals from circuit courts, does not render applicable to that court the provision of the subsequent judiciary act of March 3, 1891, § 5, allowing appeals from the existing circuit courts to the United States Supreme Court in cases of conviction of a capital or otherwise infamous crime.— *In re Heath*, U. S. S. C., 12 S. C. Rep. 615.

53. FEDERAL OFFENSE — Appeal in Criminal Cases. — Neither under the common law nor under the judiciary act of March 3, 1891, ch. 517, §§ 5, 6, has the United States the right to sue out a writ of error in a criminal case upon a judgment in favor of defendant, whether rendered upon a verdict of acquittal or upon a determination by the court of an issue of law.— *United States v. Sanges*, U. S. S. C., 12 S. C. Rep. 609.

54. FEDERAL OFFENSE—Conspiracy—Indictment.—An indictment under Rev. St. U. S. § 5440, must charge three things: (1) A conspiracy; (2) either to commit some offense against the United States, or to defraud the United States; (3) the doing of some act to effect the object of the conspiracy.— *United States v. Adler*, U. S. D. C. (Iowa), 49 Fed. Rep. 737.

55. FRAUDULENT CHATTEL MORTGAGE.—Where a chattel mortgage is executed on a stock of lumber and merchandise to secure a *bona fide* indebtedness for money advanced by the mortgagee, and the mortgagor is permitted to retain possession of the property mortgaged without any authority from the mortgagee to sell any part thereof, the fact that a few articles of small value were sold by the servant of the mortgagor without the knowledge or consent of the mortgagee is not of itself sufficient to raise a conclusive presumption that the mortgage is fraudulent as to creditors.—*Whitney v. Levon*, Neb., 51 N. W. Rep. 972.

56. GRAND JURORS—Naturalization.—A man who came to this country with his father when a child; whose father, now dead, told him he was naturalized, and voted as a citizen; who has himself exercised the rights of a citizen in the parish without question for 30 years, —is not to be declared disqualified because he cannot produce his father's naturalization papers, and, owing to his father's residence in several States, does not know where to find the judicial record thereof.—*State v. Guillory*, La., 10 South. Rep. 761.

57. GUARDIAN AND WARD — Accounting.—Tender, as a condition precedent to the institution of a suit to annul a settlement or contract, under which money passed from the defendant to the plaintiff, may be executed where contractual relations could legally exist between them; but it cannot be required from a minor by a tutor, sued for an account, between whom no such relations existed.— *Rist v. Hartner*, La., 10 South. Rep. 759.

58. GUARDIAN AND WARD — Sale of Ward's Land. — Where a sale by a non-resident guardian of his ward's land in this State was duly licensed and ordered, and his name was authoritatively and correctly attached to the notice of sale, an error in the published signature of his attorney, also attached thereto, *held* an informality merely, and not sufficient to make the sale void.—*Richardson v. Farwell*, Minn., 51 N. W. Rep. 915.

59. HABEAS CORPUS — Unconstitutional Procedure.— Even if Rev. St. § 4697, as amended by Laws 1883, ch. 164, is unconstitutional in so far as it prescribes the procedure after a disagreement on the issue of insanity in a criminal case, still, the court having jurisdiction of the person of the accused and of the subject-matter

of prosecution, the judgment will not be void so as to warrant the discharge of the prisoner held in custody by such judgment, but his remedy will be by writ of error.—*In re French*, Wis., 51 N. W. Rep. 960.

60. HOMESTEAD. — Where a husband alone conveyed land constituting a homestead to his wife, such conveyance is not void as an alienation of the homestead, within the meaning of Const. art. 10, § 2, and Code, § 2507, but, under Act 1887 (married woman's law), enabling the husband to convey land to his wife, passed the legal title, subject to all pre-existing homestead rights. — *Turner v. Bernheimer*, Ala., 10 South. Rep. 750.

61. INJUNCTION — Contempt. — An order punishing a person for contempt in disobeying an injunction, where the contempt proceeding is not and cannot be used as a remedy to enforce obedience to the injunction or to indemnify the party injured by the contempt, is not an order made in an action or special proceeding, and is therefore not appealable. Such a contempt proceeding is not remedial in its character, but purely of a criminal nature, its object being exclusively to vindicate the authority of the court.—*State v. Davis*, N. Dak., 51 N. W. Rep. 942.

62. INJUNCTION—Powers of Executors. —Where executors are directed by the will to lay off land in one-acre lots before selling it, and they are proceeding, after laying off the tract into lots, not of an acre but of less dimensions, to offer the tract for sale as a whole, it is no abuse of discretion to enjoin the sale at the instance of legatees whose interest in the estate depends upon the amount realized by the executors in conducting the administration.—*Napier v. Napier*, Ga., 14 S. E. Rep. 870.

63. INSURANCE — Conditions. — An insurance policy covered 16 tenement houses, consisting of eight double houses, separated by lanes, each of the 16 being valued at $187.50, and provided that, if the premises became unoccupied, and remained so for 20 days, without the consent of the company, the policy should be void: *Held*, that a vacancy of several of the houses beyond the prescribed time did not render the policy void as to the occupied houses, nor did the occupancy of a portion of the houses exempt the unoccupied portion from the operation of the condition. — *Connecticut Fire Ins. Co. v. Tilley*, Va., 14 S. E. Rep. 851.

64. INSURANCE—Damages.—A policy of fire insurance, containing a provision that, if there be other insurance on the property, the loss, if any, shall be adjusted among the several insurers, is not a "writing for the payment of money," within Code, § 3285, dispensing with an inquiry of damages in an action of such writing in case of judgment by default.—*Commercial Union Assur. Co. of London, v. Everhart's Adm'r*, Va., 14 S. E. Rep. 836.

65. INSURANCE—Proof of Loss.—Where a policy of fire insurance provided that the assured should give written notice of loss, and that payment should be made on receipt of proof of loss, but did not state in what manner the proofs should be made, nor by or to whom the notice should be given, it was sufficient that the company's local agent immediately notified it of the loss, and that it thereupon sent an adjuster, who investigated the loss, and made an estimate of the same.—*Phœnix Ins. Co. of Brooklyn v. Perry*, Ind., 30 N. E. Rep. 637.

66. INSURANCE—Unoccupied Buildings.—A stipulation in a policy of fire insurance on a barn that it would be void if the building, "whether intended for occupancy by the owner or tenant, be or become vacant or unoccupied, and so remain for ten days," was not affected by the fact that the barn was unoccupied at the time that the policy was issued; and, where the barn remained unoccupied for more than 10 days without the knowledge or consent of the company, a loss thereafter, while still so unoccupied, did not give the insured a right of action. — *England v. Westchester Fire Ins. Co. of New York*, Wis., 51 N. W. Rep. 954.

67. INSURANCE COMPANIES—Insurance Contracts.—By chapter 180, Laws 1885, "millers' and manufacturers' mutual insurance companies," organized under chapter 91, Gen. Laws 1881, having the specified amount of "capital," were authorized to enter into contracts of simple "all cash" (not mutual) insurance to the limited extent specified.—*In re Minneapolis Mut. Fire Ins. Co.*, Minn., 51 N. W. Rep. 921.

68. INSURANCE COMPANY — Insolvency. — Where in an application against a mutual fire insurance company for a receiver the company appeared and admitted its insolvency, whereupon it was adjudged insolvent, and its policies ordered canceled, and a receiver appointed, its policy-holders, being members of the company, under Rev. St. §§ 3751, 3752, are barred, without further notice, and cannot recover for losses occurring thereafter.—*Reliance Lumber Co. v. Brown*, Ind., 30 N. E. Rep. 625.

69. JUDGMENT—Corporation—Appearance.—In an action by a non-resident against a foreign corporation on a foreign contract, the corporation is not amenable to process under Code, art. 23 § 296; but if the corporation voluntarily appears, and the case is tried on its merits, the validity of the judgment rendered cannot be questioned.— *Fairfax Forest Min. & Manuf'g Co. v. Chambers*, Md., 23 Atl. Rep. 1024.

70. LANDLORD AND TENANT. — Where defendant in *assumpsit* for the use and occupation of land claimed that he surrendered his term to the agent of his landlord, who accepted it, the question was one of fact for the jury.— *Murphy v. Losch*, Pa., 23 Atl. Rep. 1059.

71. LIS PENDENS—Injunction.—Under Code La. art. 2453, relating to the effect of pending suits, one who obtains a sheriff's deed through the enforcement of a mortgage, pending an action by a third person to recover the lands from the mortgagor, takes subject to the result of such action, and may be ejected by a writ of possession, notwithstanding that his mortgage was on record at the commencement of the action, and that he was not made a party thereto.—*Lacassagne v. Chapuis*, U. S. S. C., 12 S. C. Rep. 659.

72. MALICIOUS PROSECUTION — Probable Cause.—The giving of an instruction that an inference of malice may be made from want of probable cause is not reversible error when the jury are told in other instructions that the inference is simply one of fact, not conclusive, but to be weighed with all the other facts and circumstances in the case, from which they must find malice affirmatively, as an independent fact, before the plaintiff can recover.—*Fugate v. Millar*, Mo., 19 S. W. Rep. 71.

73. MANDAMUS TO COUNTY COURT.—*Mandamus* does not lie to the county court to compel payment of a claim against the county, since a specific remedy is given in case of a rejected claim, in Rev. Stat. § 3443, which provides that, "if any account presented against a county be rejected by the county court, the party aggrieved thereby may prosecute an appeal to the circuit court as in other cases," etc.—*State v. County Court of Cape Girardeau County*, Mo., 19 S. W. Rep. 23.

74. MARINE INSURANCE—Negligence of Master.—Where the policy insured a steam-boat, and recited that defendant assumed thereunder the unavoidable dangers of the river, and that it should be free from all loss caused by barratry, the fact that the boat was stranded by carelessness or unskillfulness of the master will not preclude a recovery against defendant, in the absence of evidence of fraud on such officer's part.—*Louisville Underwriters v. Pence*, Ky., 19 S. W. Rep. 10.

75. MARRIED WOMAN — Construction of Deed. —The words in a deed "to J, trustee of M, and her heirs and assigns," create a trust, but not a separate estate, which M, a married woman, could bind by her contracts as if she were sole.—*Warren v. Castello*, Mo., 19 S. W. Rep. 29.

76. MASTER AND SERVANT —Negligence—Fellow-servants.—A conductor of a material train, having control of it and its movements, and a foreman over a gang of men engaged in repairing a railroad track, having power to direct them what to do and when to do it, are not fellow-servants of the men composing such gang.—*Miller v. Mo. Pac. Ry. Co.*, Mo., 19 S. W. Rep. 58.

77. MASTER AND SERVANT—Negligence—Knowledge of Defects.—For a fireman, knowing of a defect in the air-brake, to remain upon a locomotive is not conclusive of negligence on his part, and it is a proper question for the jury whether the defect is such that a man of ordinary prudence and intelligence would not have remained, and also whether the accident would have happened had the brake been in proper order.—*New Jersey, etc. R. Co. v. Young*, U. S. C. C. of App., 49 Fed. Rep. 723.

78. MASTER AND SERVANT—Negligence.—Evidence that, while plaintiff was attempting to uncouple cars in a yard, the cars moved suddenly, throwing him off, and injuring him, and that the railroad company had failed to promulgate and enforce rules in regard to its work, is insufficient to justify a recovery in the absence of any evidence showing a causal connection between the accident and the failure to have rules.—*Rutledge v. Mo. Pac. Ry. Co.*, Mo., 19 S. W. Rep. 38.

79. MECHANIC'S LIEN—Foreclosure.—In an action to foreclose a mechanic's lien it appeared that plaintiffs had offered to complete a building which had been left unfinished by the former contractor, that their offer had been accepted by the architect, and that the lien was for work done in completing the building: *Held*, that the questions whether the architect acted in the matter as contractor or as agent for the owner, and whether plaintiffs' work was done under the terms of the original contract, were for the jury.—*Goodfellow v. Manning*, Pa., 23 Atl. Rep. 1052.

80. MECHANIC'S LIENS—Parties.—Action was brought against the party who contracted for materials for the erection of a dwelling to foreclose a mechanic's lien within two years after the filing of the lien, but the owner of the legal title was not made a party until after the expiration of the statutory period: *Held* that, as to him, the suit was commenced only from the time he was made a party, and that the action was barred as to such new party.—*Green v. Sandford*, Neb., 51 N. W. Rep. 967.

81. MINING CLAIMS—Location—Apex.—The apex of a vein is not necessarily a point, but often a line of great length, and any portion of the apex on the course or strike of the vein found within the limits of a claim is a sufficient discovery to entitle the locator to obtain title.—*Larkin v. Upton*, U. S. S. C., 12 S. C. Rep. 614.

82. MORTGAGE—Foreclosure—Parties.—In an equitable action to foreclose a real estate mortgage the owner of the equity of redemption is the only necessary party defendant.—*Carpenter v. Ingalls*, S. Dak., 51 N. W. Rep. 948.

83. MORTGAGE—Foreclosure.—Where suit is brought on a mortgage declaring that, upon default in the payment of the interest, the entire debt shall immediately become due and payable, at the option of the holder, and the mortgagor offers no defense for the default, except his own neglect and the fact that no notice had been given him of the time of payment, this will not avail, upon tender merely of the interest, to restrain the proceeding for the entire debt.—*Warwick Iron Co. v. Morton*, Pa., 23 Atl. Rep. 1065.

84. MORTGAGE — Foreclosure Sale — Notice. — Under Gen. St. § 2424, providing that "all notices for the sale of any real estate under execution or order of court shall be advertised for 21 days prior to such sale; that is to say, once a week for at least three weeks prior thereto,"—21 days need not elapse between the first notice of a sale under foreclosure and the sale, if in such time the notice has been published once a week for three weeks before the sale.—*Alexander v. Messervey*, S. Car., 14 S. E. Rep. 854.

85. MORTGAGE ON CROPS.—A chattel mortgage, which covers all crops to be grown on certain specified land "during the years A. D. 1888, 1889, and for each and every succeeding year until the debt hereby secured is fully paid," is not void as to the crop raised by the mortgagor on said land in the year 1890, by reason of any uncertainty as to the time when the crops covered by said mortgage are to be grown.—*Merchants' Nat. Bank of Devil's Lake v. Mann*, N. Dak., 51 N. W. Rep. 946.

86. MUNICIPAL CORPORATION — Annexation. — Land which adjoins a city, and has little value for rural uses, but has great value for prospective urban purposes, may be properly annexed to such city.—*Woodruff v. City of Eureka Springs*, Ark., 19 S. W. Rep. 15.

87. MUNICIPAL CORPORATION — Annexation. — Under Mansf. Dig. § 922, providing that "when any municipal corporation shall desire to annex any contiguous territory thereto, lying in the same county, it shall be lawful for the council to submit the question to the qualified electors at least one month before the annual election," the council is required to make an order at least a month before the annual election for the submission of the question at that election, and not to submit the question at an election held one month before the annual election.—*Vogel v. City of Little Rock*, Ark., 19 S. W. Rep. 13.

88. MUNICIPAL CORPORATION—Changing Grade—Damages.—A city, in changing the grade of a street, excavated to the depth of 30 feet, and plaintiff's abutting land caved in to such an extent as to destroy the walls of brick buildings thereon 20 feet from the building line. The city used the earth that fell in a neighboring fill: *Held* a taking of plaintiff's property without compensation, and that the damages resulting to him were direct, and not consequential.—*Stearns v. City of Richmond*, Va., 14 S. E. Rep. 847.

89. MUNICIPAL CORPORATION — Defective Sewer. — Const. art. 16, § 8, declaring that "municipal and other corporations invested with the privilege of taking property for public use shall make just compensation for property taken or destroyed by the construction or enlargement of their works or improvements," does not give the owner of private property a right of action against a city for injury caused his property by the construction of a sewer inadequate to carry off the water, whereby the water is banked up and backed upon his property, where the construction of the insufficient sewer is due to a mistake of judgment on the part of the city authorities, and not to an improper construction of the sewer.—*Bear v. City of Allentown*, Pa., 23 Atl. Rep. 1062.

90. MUNICIPAL CORPORATION —Indebtedness.—Where negotiable certificates of indebtedness issued by a city have been sued upon by the payee, and declared invalid for want of power to issue negotiable instruments, the payee may maintain an action for money had and received, provided the city had power to make the contract out of which the indebtedness arose; and the fact that the payee was not a party to that contract is immaterial when the certificates were issued to him at the request of the contractor, and the money was received by the city and paid over to the contractor.—*Bangor Savings Bank v. City of Stillwater*, U. S. C. C. (Minn.), 49 Fed. Rep. 721.

91. MUNICIPAL CORPORATION — Sales of Liquors in Parks.—Under the power given to the municipality to "regulate all parks belonging to the city" it can provide rules for the management and government of the park, and secure thereby some one to serve refreshments therein for the benefit of the public; and such use cannot be regarded as any diversion of the legitimate uses of the park.—*State v. Schweickardt*, Mo., 19 S. W. Rep. 47.

92. MUNICIPAL CORPORATION—Street Railway Company—Grade. — By ordinance granting a franchise to a street railway company, the city reserved the right to change the grade of its streets, and provided that the company should lay its tracks in accordance with the grades as they were then or might thereafter be established; and, after notice of a change in the grade, the company "shall, at its own expense, conform and adjust the tracks" to such changed grade: *Held* that, where the city raised the grade of the street after the tracks were laid, the company was bound to raise its

road-bed at its own expense to conform to the change, rather than only adjust its track after the city had raised the bed.—*City of Little Rock v. Citizens' St. Ry. Co.*, Ark., 19 S. W. Rep. 17.

93. MUTUAL BENEFIT ASSOCIATIONS — Membership.—The charter and by-laws of the New York Cotton Exchange provide that death benefits arising from assessments shall not extend to a person who had ceased to be a member, and that deaths in the membership are to be reported by the trustees to the managers who levy the assessments: *Held* that, the liability to levy an assessment appearing to be absolute, the investigation of the trustees is not conclusive as to whether decedent was a member or not.—*Dillingham v. New York Cotton Exchange*, U. S. C. C. (N. Y.), 49 Fed. Rep. 719.

94. MUTUAL BENEFIT INSURANCE—Insurable Interest.—Where the charter of a benevolent association does not require the beneficiary of a certificate of membership to have an insurable interest in the life of the member, and the member himself made the contract with the association, the beneficiary in an action on the certificate need not allege an insurable interest.—*Masonic Ben. Ass'n of Central Illinois v. Bunch*, Mo., 19 S. W. Rep. 25.

95. NEGOTIABLE INSTRUMENT—Accommodation Notes—Alteration. — Where accommodation notes are made payable to the accommodation maker, and indorsed in blank by him and by the real debtor, the fact that the latter, without the former's knowledge, causes to be stamped upon the back a clause waiving demand and protest, and guarantying payment, does not affect the liability of the former, although the words are inadvertently stamped above his signature. — *Gordon v. Third Nat. Bank of Chattanooga*, U. S. S. C., 12 S. C. Rep. 657.

96. NEGOTIABLE INSTRUMENT—Parol Evidence.—In an action on a note, in which defendants expressly promised to pay a certain sum of money, evidence is inadmissible that defendants signed the note not intending it to be an obligation to pay a definite sum of money, but as an undertaking to furnish plaintiff with a horse, and that the note was signed on plaintiff's express representation that it was a mere matter of form and not an obligation.—*Zeigler v. McFarland*, Penn., 23 Atl. Rep. 1045.

97. NEW TRIAL—Delay.—Where the movant for a new trial make out a brief of evidence in due time, and presents it for approval, and it is not approved until the next term of the court solely because the presiding judge fails sooner to satisfy himself of its correctness, the delay is the act of the court, and not of the party; consequently such delay is no ground for dismissing the motion for a new trial.—*Kerchner v. Frazier*, Ga., 14 S. E. Rep. 883.

98. NOTARY PUBLIC—Alien.—Although one not a citizen of the United States is ineligible as a notary public, under Const. art. 8, § 12, and Rev. St. 1889, § 7107, yet an alien who has been duly commissioned as such is a *de facto* notary, and has authority to acknowledge deeds. —*Wilson v. Kimmel*, Mo., 19 S. W. Rep. 24.

99. PARTITION—Foreclosure—Homestead.—In a partition suit brought by some of the adult heirs of a deceased mortgagor in regard to land occupied by his widow and minor heirs as a homestead, plaintiffs have no right to compel a foreclosure of the mortgage where the interest is paid promptly by the widow, and the mortgagee does not desire to foreclose.—*Hannah v. Hannah*, Mo. 19 S. W. Rep. 87.

100. PENSIONS—Fraudulent Presentation.—An indictment under Rev. St. § 4746, for knowingly procuring the presentation of a false affidavit concerning a claim for pension, is sufficient if it alleges the presentation of an affidavit with a signature known to be false and forged. It need not allege that the pension claim was false.—*United States v. Adler*, U. S. D. C. (Iowa), 49 Fed. Rep. 733.

101. PROCESS—Summons and Attachment Order.—On the back of a summons issuing in the name of the commonwealth, and signed by the clerk, was an order of attachment, also signed by the clerk, but, when read by itself, not issuing in the name of the commonwealth: *Held*, that the summons and indorsement would be read together, as forming one writ, and the attachment thus regarded as issuing in the name of the commonwealth, especially as the practice of thus indorsing orders for attachment had, for a long time, prevailed in many of the courts.—*Northern Bank of Kentucky v. Hunt's Heirs*, Ky., 19 S. W. Rep. 3.

102. PUBLIC LANDS—Boundaries.—An entry of government land, bounded by a meander line, does not include land lying at the time between such meander line and the bank of the river.—*Harrison v. Stipes*, Neb., 51 N. W. Rep. 976.

103. QUIETING TITLE — Complaint. — A complaint in quieting title, which alleges that plaintiff "is the owner by a complete equitable title, and is entitled to the possession" thereof, is good on demurrer, without specifying the nature and extent of such title.—*Stanley v. Holliday*, Ind., 30 N. E. Rep. 634.

104. QUO WARRANTO—Abandonment.—When the only claim of the relator to an office is the right to hold over, after the expiration of his term, on the ground that the respondent, his successor elect, is ineligible, and, while, the action is pending and undetermined, he voluntarily abandons the office in controversy, and surrenders it to the respondent, such act will disqualify him to further prosecute as relator, and amounts to an abandonment of the action.—*State v. Boyd*, Neb., 51 N. W. Rep. 964.

105. QUO WARRANTO—Jurisdiction.—Where usurpation of a public office or a franchise is claimed by the State, and an information in the nature of a *quo warranto* is filed by the attorney general to test the right to hold such office or enjoy such franchise, it is only necessary to allege generally that the person holding the office or enjoying the franchise does so without lawful authority and in such a case, as against the State, it devolves upon such person to show a complete legal right to enjoy the privileges in question, but if the information states the facts upon which the charge of usurpation is based, and those facts show a clear legal right in respondent, it will be insufficient.—*Town of Enterprise v. State*, Fla., 14 S. E. Rep. 740.

106. RAILROAD—Contractor's Liens—Filing Account.—Under Rev. St. Mo. 1879, § 3202, providing that the lien of a railroad contractor must be filed within 90 days next after the completion of the work, etc., and that all actions to enforce such liens must be commenced within 90 days after filing the lien, and prosecuted without unnecessary delay to final judgment, and that no lien shall continue to exist for more than 90 days after it is filed unless suit is instituted within such time (*Id.* § 3205), successive liens for the same labor and materials cannot be filed. The filing of one account, sufficient to create a lien under the statute, exhaust the contractor's power to incumber the property; and the 90 days' run from such time, and cannot be extended by the filing of an amendment or a new lien within the original 90 days.—*Battle v. McArthur*, U. S. C. C. (Mo.), 49 Fed. Rep. 715.

107. RAILROAD COMPANIES—Condemnation of Land—Evidence.—In assessing the damages sustained by the construction of a railroad through a large tract of land already intersected by two railroads, evidence of the effect of such railroad upon the value of portions of the land beyond the other railroads is admissible, since it is a question for the jury whether they consist of parts of the same tract or of separate and distinct parcels.—*Chicago & W. M. R. Co. v. Huacheon*, Ind., 30 N. E. Rep. 636.

108. RAILROAD COMPANIES — Receivers. — The order which the court of equity, on appointing a railroad receiver, makes for the payment of wages due employees for a reasonable period prior to the receivership, is merely a personal protection, given *ex gratia* to those who depend upon their daily labor for support, and

will not cover a claim by a merchant for rations furnished to such laborers, under contract with the company, and for which the company alone is liable, although the company charges the rations to its laborers as part of their wages.—*Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.*, U. S. C. C. (S. Car.), 49 Fed. Rep. 693.

109. RAILROAD CORPORATIONS — Residence.—Where a railway company performs its functions within the State of Tennessee as a domestic corporation by virtue of a charter granted by the legislature, the fact that the same incorporators obtained earlier charters from Alabama and Mississippi, and effected an organization and still do business in those States, does not render the corporation any less a resident of Tennessee.—*Mobile & O. R. Co. v. Barnhill*, Tenn., 19 S. W. Rep. 21.

110. RAILWAY COMPANIES—Accident at Crossing—Negligence.—The court properly submitted to the jury the questions: (1) What would a man of ordinary prudence have done under the circumstances? and (2) did plaintiff's conduct conform to that standard?—*Gratiot v. Missouri Pac. Ry. Co.*, Mo , 19 S. W. Rep. 31.

111. REAL-ESTATE AGENTS — Commissions.—Where a real estate broker procures for his seller a purchaser, who contracts to purchase on the seller's terms, the seller being unacquainted with the purchaser's standing, and not informed thereof by the broker, and the purchaser turns out to be pecuniarily unable to complete the purchase, the broker is not entitled to his commissions.—*Butler v. Baker*, R. I., 23 Atl. Rep. 1019.

112. REAL-ESTATE BROKERS—Contract.—The plaintiffs, real-estate agents, were to receive certain commissions for services in securing a lessee for defendant upon terms specifically agreed on between the parties, and they procured an informal agreement for a lease to be signed by the defendant and an applicant for a lease: *Held*, that the defendant might show by parol, as against these plaintiffs, that the contract was merely provisional, and did not express all the terms of the lease to be entered into by the parties.—*Buxton v. Beal*, Minn., 51 N. W. Rep. 918.

113. REMOVAL OF CAUSES—Appearance in State Court.—An appearance in the State court to file a petition and bond for removal does not waive the right to present in the federal court any question of jurisdiction which might have been urged in the State court, and concerning which the federal court has power to act.—*O'Donnell v. Atchison, T. & S. F. R. Co.*, U. S. C. C. (Iowa), 49 Fed. Rep. 689.

114. SALE—Warranty.—Where, by the bill of lading, the goods are deliverable to the order of the consignor, who indorses it in blank and delivers it, together with his draft for the purchase price, to a bank, indorsing the draft for deposit to his own credit, and the bank thereupon forwards both documents to another bank, at the place at which the goods are consigned, and a third person pays the draft, receives the bill of lading, and takes the goods as purchaser, the bank is not a joint vendor with the consignor, but the consignor alone is the vendor, and liable to the purchaser for any defect in the quality of the goods, or any failure of an implied warranty as to their quality.—*Fourth Nat. Bank of Cincinnati v. Mayer*, Ga., 14 S. E. Rep. 891.

115. STATUTES—Presumption—Constitutional Requirements.—Upon demurrer to an indictment on the ground that the statute on which it is based was not passed in a constitutional manner, the presumption of the validity of the law must prevail, since, until the journal entries of the legislature are brought before the court, they will not be considered in passing upon the validity of the law.—*State v. Wray*, Mo., 19 S. W. Rep. 86.

116. TAXATION — Gas Companies.—A company incorporated for the purpose of manufacturing illuminating gas, and supplying the same to the inhabitants of a borough, being a public corporation, cannot, in addition to the State tax required by law on its capital stock be assessed for county purposes on its land and gas-works which are necessary for carrying on its business, but may be so taxed on a dwelling-house situated on the land, which it does not use in its business, but lets to a tenant.—*Schuylkill County v. Citizens' Gas Co. of Tamaqua*, Penn., 23 Atl. Rep. 1055.

117. TOWNS—Defective Highways—Negligence.—In an action by an administrator against a town for damages for the loss of a horse, harness, and wagon, by reason of a defective highway, plaintiff claimed that the highway was defective for want of a railing, while defendant alleged that a line of trees along the side of the road was a sufficient guard, and that deceased negligently drove out of the traveled highway: *Held*, that the question of decedent's contributory negligence was for the jury.—*Lutton v. Town of Vernon*, Conn., 23 Atl. Rep. 1020.

118. TRIAL — Competency of Jurors.—A juror who is sometimes known as W. W. Bradley and sometimes as W. M. Bradley, and who writes his name sometimes one way and sometimes the other, may be described in the jury list by either name, it not appearing that his true name partakes more of one form than of the other, and there being affirmative evidence tending to show that he was the identical person referred to in the jury-list, and no evidence to the contrary.—*Poole v. Callahan*, Ga., 14 S. E. Rep. 867.

119. TRIAL — Jurors — Challenges.—Under Code Civil Proc. Or. § 187, providing that an opinion already formed by a juror is not alone sufficient to sustain a challenge, but that the court must be satisfied from all the circumstances that the juror cannot try the case impartially, the ruling of the court on the juror's qualifications will not be reviewed unless all of the evidence taken at the examination be presented in the record, although the testimony produced shows the jurors to have a fixed opinion on the merits of the cause.—*Southern Pac. Co. v. Rauh*, U. S. C. C. of App., 49 Fed. Rep. 696.

120. TRUSTEES — Estoppel.—A trustee is estopped to refuse to account to his *cestui que trust* on the ground that the will which made him a trustee also made him an executor, when he has taken possession of the real estate as well as the personalty, and has neglected to render an account as executor.—*Wooden v. Kerr*, Mich., 51 N. W. Rep. 937.

121. VENDOR AND VENDEE—Time of the Essence.—An agreement to convey a certain interest in mines, upon demand, within 12 months, passes no present interest in the property, but makes time of the essence of the agreement; and if the conveyance is not demanded within that period the obligation to make it ceases altogether.—*Waterman v. Banks*, U. S. S. C., 12 S. C. Rep. 646.

122. WATERS—Surface Water—Trespass.—The right of a land owner to sue for damages caused by obstructing the natural flow of water, and throwing it back on his land, is not abridged or in any way affected by Act April 4, 1868, which provides a judicial procedure by which the owners of wet or spouty lands in certain counties can be compelled to drain the same.—*Glass v. Fritz*, Penn., 23 Atl. Rep. 1050.

123. WILL — Codicil — Execution.—A testator, after a codicil to his will had been written, started to sign his name thereto, made a stroke of his pen which resembled the first part of the first letter of his name, and then stopped, saying, "I can't sign it now:" *Held*, that the codicil was not valid, since the stroke was not a signature, and the facts showed that the testator did not intend to execute it by a mark.—*In re Plate's Estate*, Penn., 23 Atl. Rep. 1038.

124. WILLS—Probate of Codicil.—A codicil, whose only provision is the appointment of an executor who has since died, cannot be admitted to probate apart from the will.—*In re Pepper's Estate*, Penn., 23 Atl. Rep. 1039.

125. WILLS—Undue Influence.—A devise by a woman of feeble intellect to the draughtsman of her will, who for years had been the only person confided in by her with reference to her property, to the exclusion of her heirs, raises a presumption of undue influence, to be rebutted by such devisee.—*Wood's Ex'r. v. Devers*, Ky., 19 S. W. Rep. 1.